83-154

No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TITLE INSURANCE RATING BUREAU
OF ARIZONA, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN F. GRAYBEAL
(Counsel of Record)
JAY N. VARON
FOLEY, LARDNER,
HOLLABAUGH & JACOBS
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-5300

JOHN C. CHRISTIE, JR.
STEPHEN J. LANDES
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
Attorneys for Petitioner

[Of Counsel Listed on Inside Cover]

QUESTION PRESENTED

The Justice Department charged in this case that a title insurance rating bureau and its members violated the Sherman Act by jointly filing rates for escrow services albeit in accordance with the Arizona Insurance Code regulating title insurers and the rates they charge the public. The Code required rates for title insurance and escrow services to be filed with the Director of Insurance and it required the Director to disapprove rates not meeting certain specified criteria designed to ensure the solvency and stability of title insurers. The courts below determined that a violation of the federal antitrust laws had occurred because the Code only authorized cooperative ratemaking even though it required that escrow rates be established in accordance with statutory non-market criteria rather than by the workings of the marketplace. One basic question of federal antitrust law is presented:

> Whether, in a state regulatory system which requires rates for escrow services to be established in accordance with non-market criteria rather than by unregulated competition, the state's authorization of joint ratemaking is protected by the state action doctrine from federal antitrust challenge.

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Petitioner, Title Insurance Rating Bureau of Arizona, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on March 7, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 700 F.2d 1247 and appears as Appendix A. The opinion of the District Court is reported at 517 F. Supp. 1053 and appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1983. This Court granted timely motions for

extensions of time within which to file this petition to and including August 1, 1983. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

In 1968, the Arizona legislature adopted significant changes in the state Insurance Code so as to establish a comprehensive regulatory scheme over the rates and rate-making practices of the title insurance industry. Prior to that time, title insurance rates in Arizona had not been regulated by the state but had been determined by market forces. Pursuant to the 1968 amendments, title insurers and their agents were required to file their rates with the Director of Insurance. They were allowed either to file rates individually or to join a rating bureau which would file rates for them. In either event, the Director of Insurance was required to review the filings to ensure that the proposed rates met various statutory criteria and to issue an order disapproving rates not meeting those criteria.[1] Some of the requirements for rates specified by the statute are that they be "not excessive or inadequate for the safety and soundness of any title insurer" and that they give "due consideration" to the "desirability for stability of rate structures," the "necessity . . . of assuring the financial solvency of title insurers" and the "necessity for paying dividends on

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[1] Ariz. Rev. Stat. Ann. §§ 20-376(D), 20-378(A) (West Supp. 1982-1983). Pertinent provisions of the Arizona Insurance Code appear as Appendix C.

the capital stock of title insurers sufficient to induce capital to be invested therein." [2] Once a rate filing becomes effective after such Insurance Department review, the title insurers and agents governed by that filing are required to charge the filed rates.[3]

Petitioner, Title Insurance Rating Bureau of Arizona, Inc. ("TIRBA"), was formed in 1968 by title insurers and agents in Arizona in reliance upon the joint rate-making provisions contained in the amended Arizona Insurance Code. After its establishment, TIRBA filed title insurance rates for its members and subscribers who, in turn, charged those rates, in accordance with this statutory scheme.

In 1977 the Arizona legislature again amended the state's Insurance Code. The legislature recognized the long-standing practice in Arizona for the provider of title insurance also to provide escrow services. However, since the rates for escrow services were not regulated by the Insurance Code, it became apparent that the practices of rebating and discounting escrow services in order to attract title insurance business threatened the financial stability of title insurers and thereby undermined the regulatory structure that was embodied in the 1968 amendments. Accordingly, the legislature made the Code applicable to the provision of escrow services by title insurers or their agents and in doing so, it made the same statutory standards and regulatory requirements as had governed title insurance rates, applicable to escrow services.[4] Thereafter, in compliance with state law, TIRBA continued to file title insurance rates and began to file escrow rates as well.

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[2] *Id.*, § 20-375(A).

[3] *Id.*, § 20-376(H).

[4] *Id.*, § 20-1562(2).

On September 23, 1980, respondent United States of America brought this antitrust action in the United States District Court for the District of Arizona seeking injunctive relief for an alleged violation of Section 1 of the Sherman Act. The complaint charged that the members of TIRBA, by agreeing upon and filing joint escrow rates through TIRBA, had engaged since 1977 in an unlawful conspiracy to fix prices in violation of Section 1.

In the District Court, petitioner argued that escrow services performed in connection with the issuance of a title insurance policy in Arizona serve to evaluate and define the risk to be assumed and therefore are a part of the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and that filing and charging such rates pursuant to the Arizona Insurance Code is protected from the Sherman Act by the state action doctrine. On cross-motions for summary judgment, the District Court rejected both of these arguments holding that escrow services performed by TIRBA members and agents do not serve to "spread risk" and therefore are not the "business of insurance." *United States v. Title Ins. Rating Bureau of Arizona, Inc.*, 517 F. Supp. 1053, App. B, *infra* at 19a (D. Ariz. 1981). The court rejected the state action defense holding that TIRBA and its members are not compelled to file a uniform rate and that Arizona has not sought to "take the escrow service business out of the competitive field" and subject it to a regulatory scheme. App. B, *infra* at 21a.

On appeal, the Ninth Circuit affirmed the District Court. 700 F.2d 1247 (9th Cir. 1983). Regarding the state action defense, which is the subject of this petition, the court referred to *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) as the pertinent authority. In doing so, however, the Ninth Circuit observed that the Arizona statutes do not *require* uniform escrow rates and therefore "[t]he most that can be said . . . is that the statute authorizes co-

operative action in rate-making." App. A, *infra* at 11a. The court concluded that "[t]his does not constitute a clearly articulated and affirmatively expressed state policy to restrict competition." *Id.*[6]

REASONS FOR GRANTING THE WRIT

1. This Case Will Have A Significant Impact Upon The Ability Of The States To Engage In Economic Regulation, And Particularly, The Regulation Of Insurance.

The lower court decisions in this case threaten the long-acknowledged prerogative of state legislatures to regulate economic activity and particularly their ability to regulate rates. The issue raised in this case, namely the viability of state insurance regulation, is not limited to the State of Arizona. State regulation of the insurance industry exists in all of the fifty states and, by declaration of Congress, is "in the public interest." 15 U.S.C. § 1011 (1976).

Nor is the issue posed by this case limited to the regulation of insurance. As other cases now pending in this Court demonstrate, state economic regulation which is threatened by the lower court decisions in this case encompass activities as diverse as the administration of the legal profession and the regulation of intrastate motor common carriers. Thus, in *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982), *cert. granted sub nom. Hoover v. Ronwin*, 51 U.S.L.W. 3825 (U.S. May 16, 1983) (No. 82-1474), the Ninth Circuit reversed the dismissal of an antitrust complaint challenging bar admission procedures in Arizona. And in *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W.

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[6] Having thereby determined that the first standard of *Midcal* was not met, the Ninth Circuit concluded that it was unnecessary to consider whether the State of Arizona had actively supervised the activity in issue, the second *Midcal* standard. App. A, *infra* at 11a.

3873 (U.S. May 27, 1983) (No. 82-1922), the Fifth Circuit invalidated joint rate filing by motor common carriers.

It is the essence of the state action doctrine that the federal antitrust laws are inapplicable where a state elects to create a regulatory system having goals and objectives other than those produced by the competitive process. States regulate industries for many different reasons. With public utility regulation, a state seeks to ensure the provision of an essential service at reasonable prices. C. Wilcox and W. G. Shepherd, *Public Policies Toward Business* at 269-71 (1979). Regulation of the professions, such as that involved in *Ronwin*, assures the public of some minimal quality of service. In other industries, such as the common carrier industry as exemplified by the *Southern Motor Carriers* case, the primary motivation is to assure the public of fair treatment and access to a vital industry in a way that unregulated competition would not guarantee. A. Kahn, *The Economics of Regulation: Principle and Institutions* at 11 (1970). Finally, the primary motivation for a regulatory system over financial and insurance entities in lieu of unregulated competition is to protect the public from the economic failure of institutions which play key financial roles in the lives of many people. C. Wilcox and W. G. Shepherd, *supra*, at 485, 495. It is such regulation that is at issue in this case.[6]

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[6] As a result, the regulation of title insurers in Arizona goes far beyond the issues of rates and rate-making. The Arizona Insurance Code, among other things, dictates the proper investments of title insurers (§ 20-1564); their taxation (§ 20-1566); the means by which the title insurer determines the insurability of a risk (§ 20-1567); how the title insurer maintains, determines, releases and uses its unearned premium reserve (§ 20-1568-1571); and, when reinsurance is permitted (§ 20-1574). The Insurance Code also regulates the mergers, consolidations and acquisitions of title insurers (§§ 20-1576 and 20-1577); provides for the licensing of agents (§ 20-1580) and establishes a mechanism for the filing of

Such forms of state regulation have been consistently viewed by the Court as essential elements of our federal system and fully compatible with the Sherman Act. Beginning with *Parker v. Brown*, 317 U.S. 341 (1943), the Court has determined that Congress did not intend the federal antitrust laws to apply to actions expressly authorized by state legislation to alter competitive pricing. "The *Parker* doctrine makes plain that Congress intended the antitrust laws to defer to sovereign state economic regulatory decisions." [7]

The *Parker* doctrine, originally announced by this Court some forty years ago, has been reiterated in several cases in recent years. A critical guidepost to state action analysis comes from language in the *Parker* decision which the Court quoted more recently in *Midcal*:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. 445 U.S. at 103-04.

Thus, in our federal system the states are sovereign and the state action doctrine incorporates a presumption that actions taken by the state and its officials are valid.[8]

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policy forms with the Director of Insurance (§ 20-1591). Failure to comply with the various provisions outlined above is subject to substantial penalties and potential revocation of the right to conduct the title insurance business in the state.

[7] Davidson & Butters, *Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 Vand. L. Rev. 575, 605 (1978). *See also New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96,111 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978).

[8] *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *De Canas v. Bica*, 424 U.S. 351, 357-358 n.5 (1976); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973).

This presumption of the validity of state economic regulation creates a pattern which is wholly unlike that which arises when federally-created exemptions from the federal antitrust laws are under consideration. The state action doctrine properly considered, is not an "exemption" to the Sherman Act. Conduct which according to *Parker* was never intended to be within the reach of the Sherman Act, needs no exemption.[9] Thus, when only federal legislation is at issue and when there is no problem of federal-state conflict, the principle is often invoked that "exemptions from antitrust coverage are strictly construed," *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973), and that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored . . . ." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). Under such circumstances, the presumption is that the antitrust laws are applicable and the burden of prevailing is upon the advocate of the exemption. This frequently results in an attempt to mesh the antitrust laws with the exemption in an effort to do as little violence as possible to both and to give effect to the will of the single legislature which produced them.[10]

Proper application of the state action doctrine, however, does not involve the need to reconcile conflicting statutory patterns. Rather, in state action cases, we begin from the presumption that so long as the state clearly and affirmatively expresses a policy to displace unfet-

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[9] *See e.g., Parker v. Brown*, 317 U.S. 341, 350-51 (1943). Handler, *Antitrust-1978*, 78 Colum. L. Rev. 1363, 1378 (1978).

[10] *See, e.g., National Boiler Marketing Ass'n v. United States*, 436 U.S. 816, 822-29 (1978) (conflict between Sherman Act and Capper-Volstead Act); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-55 (1963) (conflict between Clayton Act and Bank Merger Act); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357-61 (1963) (conflict between Sherman Act and Securities Exchange Act).

tered competition and actively supervises the implementation of that policy, the federal antitrust laws are simply inapplicable, and the state legislature's sovereign act must be given full recognition.[11]

This presumption in favor of the state regulation, however, is eviscerated by restrictive applications of the state action doctrine such as those which occurred in *Ronwin*, *Southern Motor Carriers* and in this case. In each of these cases the states promulgated extensive regulatory regimes specifically intended to displace unfettered competition. These regimes involved not merely the promulgation of statutory standards and regulations but also

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[11] *Parker v. Brown*, 317 U.S. 341 (1943); *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 605 (1976) (Blackmun, J., concurring; Stewart, J., dissenting); Handler, *supra*, note 9, at 1379-82. In many different statutory contexts, this court has held that state laws are not preempted by federal statutes. *See, e.g., Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (congressional policy favoring vigorous competition does not preempt state from requiring oil producers to extend all "voluntary allowances" uniformly to all stations they supply); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977) (state unemployment compensation statute not preempted by federal act); *De Canas v. Bica*, 424 U.S. 351 (1976) (regulation of employment of illegal aliens not preempted by federal powers over immigration); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (state trade secret laws not preempted by federal patent laws); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973) (federal state exchange rule permitting forfeiture clauses in employment contracts does not preempt state rule invalidating such clauses); *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405 (1973) (eligibility standards under federally supported work incentive program do not preempt state work rules); B. Mezines, J. Stein & J. Gruff, *Administrative Law* 2.02-.03, at 2-16 to -67 (1982); Note, *Preemption or Exemption—What is the Proper Test for Home Rule Antitrust Immunity?*, 31 DePaul L. Rev. 819, 822-24 (1982); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Column. L. Rev. 623, 639-53 (1975).

the establishment of state agencies or commissions to administer and enforce them. Thus, these are not cases in which the states merely passed a law having the effect of "authoriz[ing] price-setting . . . by private parties" nor are they cases where the regulatory patterns are merely "gauzy cloak[s]" to cover "essentially private" activity. *Midcal*, 445 U.S. at 106. Nevertheless, no presumption in favor of the state statute was acknowledged and the federal antitrust laws were instead meshed with the state regulatory mechanism so as, in the case at bar, to *mandate* rate competition in the midst of a regulatory system which clearly required rates to be established according to non-market criteria.[12]

Such an illogical result was reached because of a major failing in the analyses of the lower courts. Utilizing an "exemptions" methodology, the lower courts focused erroneously on the particular procedure by which Arizona requested rates to be filed rather than the substantive criteria that the state established for such rates. Similar mistakes in the application of the state action doctrine were made by the lower courts in *Southern Motor Carriers* and *Ronwin* with the equally disturbing result that the operation of valid state regulatory regimes was frustrated and the important principles of federalism articulated by this Court in *Parker* were trampled. For this reason, the Court should consider all of these cases together and resolve them in such a way as to preserve the viability of state economic regulation. Absent such clarification, the ability of the states to regulate these industries in the manner clearly contemplated by the state legislatures will be severely inhibited.

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[12] In so doing the lower courts intruded upon the "breathing space" which states should have within which they can operate without the insistent intrusions of the federal antitrust laws. *See* Fox, *The Supreme Court And The Confusion Surrounding The State Action Doctrine*, 48 Antitrust L.J. 1571, 1577 (1980).

2. The Decision Of The Ninth Circuit In This Case Is In Conflict With Decisions Of This Court Involving The State Action Doctrine And It Demonstrates The Necessity For This Court To Provide Guidance To The Lower Federal Courts.

In its opinion three years ago in the *Midcal* case, this Court carefully considered its major decisions involving the state action doctrine and stated a formulation of that doctrine which it viewed as emanating from the collective wisdom of those decisions. That formulation was, first, that "the challenged restraint must be one 'clearly articulated and affirmatively expressed as state policy' " and "second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105. *See also, Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51 at n.14 (1982).

The District Court in this case dismissed the state action defense primarily upon the ground that "[u]nder the [Supreme] Court's reasoning in *Goldfarb* and *Cantor*, for private conduct to gain immunity from the antitrust laws based on a state action defense, the degree of government involvement must be such that the State *compels*, by statute or regulation, the private conduct." [13] In reaching back to the compulsion language of *Goldfarb* and *Cantor*, the District Court ignored the clear articulation of the standard by the Court in *Midcal*. That formulation of the doctrine, as is indicated above, appropriately and unmistakably does not utilize a compulsion test. In affirming, the Ninth Circuit applied the same erroneous standard although it referred to *Midcal* as the controlling authority.[14] The Circuit Court held that, in a factual context such as this, a state policy by definition cannot be "clearly articulated or affirmatively expressed" when the state does not require uni-

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[13] App. B, *infra* at 20a. (Emphasis added)

[14] App. A, *infra* at 10a.

form rates. According to the Ninth Circuit, "[t]he most that can be said . . . is that the statute *authorizes* cooperative action in rate-making;" viz., the challenged activity, cooperative rate-making, was not compelled by state law and therefore the state action doctrine did not apply.[15]

This Court's rejection of a compulsion test for application of the state action doctrine in *Midcal* and other cases[16] is appropriate and it is consonant with the preemption foundation of the doctrine.[17] Arizona has a

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[15] App. A, *infra* at 11a. (Emphasis added.)

[16] Rejection of the compulsion test in *Midcal* was anticipated in earlier decisions of the Court. In *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) the State of California had established under its California Automobile Franchise Act a mechanism through which existing automobile dealers could object to the establishment of new competitor automobile dealers within ten miles of their existing location. Such an objection would require the new dealer to apply to the state for approval of his location. Obviously, this was a departure from free market competition. Significantly, it was also purely voluntary on the part of the existing dealers whether or not to protest the establishment of a competitor dealership. No one was "compelled" to invoke the regulatory process. Yet the Court held that this system was protected by the state action doctrine because "the clearly articulated and affirmatively expressed" goal of the "regulatory scheme" was "designed to displace unfettered business freedom." *Id.* at 109 *citing Parker v. Brown*, 317 U.S. 341 (1943); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). *See also*, P. Areeda, *Antitrust Law* ¶ 212.5 at 59-62 (Supp. 1982).

[17] The idea that compulsion should be an additional requirement or the exclusive means by which legislative intent may be inferred is, in the view of Professor Milton Handler and others, merely

> an overreaction to Stone's caveat in Parker that a state cannot "authorize" private parties to violate the antitrust laws. This may be true if the state's involvement stops at that point; however, authorization, approval or permission if coupled with a valid regulatory purpose and other measures which ensure against unbridled anti-competitive decision making by private

clearly articulated and affirmatively expressed state policy that title insurance and escrow service rates be set according to specific non-market criteria designed to promote the stability and solvency of title insurers. Pursuant to that policy, the state legislature authorized and encouraged title insurers to file escrow rates jointly in the same fashion that they had jointly filed title insurance rates since 1968.[18] Thus, as in *Parker* "[i]t is the state which has created the machinery for establishing the . . . program", thereby rendering the federal antitrust laws inapplicable. 317 U.S. at 352.

Accordingly, certiorari should be granted in this case because the Ninth Circuit's decision is in conflict with *Midcal* and contradicts the holding and rationale of the Court's state action decisions. In the *Southern Motor Carriers* decision, the Fifth Circuit considered at great length whether *Midcal* had rejected a compulsion test and expressly concluded that it had not. Despite this Court's formulation in *Midcal*, these lower courts have not yet received the message that the compulsion test has been appropriately laid to rest.[19]

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parties should normally be enough to bring Parker into play. The compulsions of law exist even when they take the form of approval or authorization.

Handler, *supra* note 9, at 1384. *See also* 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 215b at 92-97 (1978).

[18] At the time of the legislation in 1977 subjecting escrow charges by title insurers and their agents to the same regulatory regime as existed for title insurance rates, Arizona law had authorized joint rate-making by insurance rating bureaus for over twelve years. During that time TIRBA filed title insurance rates for the industry. Inasmuch as the legislature's purpose in enacting the 1977 amendments was to fold escrow rates into this existing system, it is clear that it envisaged joint rate-making of escrow rates in doing so.

[19] In the lower courts, the respondent United States argued that by allowing insurers to choose as between joint and individual rate filings, the state of Arizona expressed "neutrality" rather than a clearly articulated state policy. The government also placed great

3. The Decision Of The Ninth Circuit In This Case Is In Conflict With Decisions Of Other Circuits And Within The Ninth Circuit Itself.

In the time since this Court's decision in *Midcal* there has developed a sharp split among the various Courts of Appeals which have considered the issue with respect to whether the state action doctrine may apply when a state authorizes rather than compels the conduct in issue. The District of Columbia, Seventh and Eighth Circuits have all held that compulsion is not required, the Fifth Circuit has held that it is and the Ninth Circuit has come down both ways on the issue in this case and another rendered less than a year earlier. This conflict with respect to the application of an important antitrust doctrine illustrates the general uncertainties surrounding

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weight upon that phrase in the Insurance Code providing that "[n]othing in this article is intended to prohibit or discourage reasonable competition . . . ." Sec. 20-341.

In both respects, the government's argument conveniently forgets the larger regulatory mechanism and its specific criteria for rates. Other language of Sec. 20-341 provides that its "purpose . . . is . . . to authorize and regulate cooperative action among insurers in rate making . . . ." Unlike the respondent, the Arizona legislature did not consider joint rate making to be the equivalent of cartel activity and individual rate making to be the equivalent of free market competition. The obvious explanation for Arizona's indifference as between joint and individual rate filings is that the statutory criteria for rates must be met regardless of how rates are filed initially. Thus, Arizona's flexibility as to the mode of filing when viewed in the total statutory context, rather than supporting the government's argument that Arizona sought to preserve competition, supports instead petitioner's claim that Arizona intended to replace competition with regulation.

The "neutrality" here is quite unlike that found by this Court in *City of Boulder* where the grant of municipal home rule conveyed no state policy regarding anticompetitive policies which might be adopted by the city. In this case, however, the state regulatory regime has displaced competition—"there has been an 'affirmative addressing of the subject by the State,' the decisive factor missing in [*City of Boulder*]." *Gold Cross Ambulance v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983).

its interpretation as well as the compelling need for this Court to speak once again on this subject.

In addition to the Ninth Circuit's opinion at issue herein, the Fifth Circuit in *Southern Motor Carriers* has interpreted *Midcal* as requiring compulsion. The majority of the court there indicated that "we do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to the private party to carry out that policy or not as he sees fit." 702 F.2d at 539.

Such holdings are in sharp contrast to that of the Ninth Circuit in *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir.) *cert. denied*, 456 U.S. 1011 (1982), a case determined by another panel less than a year prior to that Court's decision in this case. Arizona enacted legislation providing that private agreements allocating racing dates at the Turf Paradise race track in Phoenix would be recognized by the Racing Commission and that in the event of conflicts, dates would be assigned. Thus, in *Turf Paradise*, as here, private parties had the option of entering into an agreement regarding their conduct, although they were not compelled to do so. The court held in *Turf Paradise*, as it should have held here, that the "statutory scheme articulate[d] a policy 'affirmatively and expressly' to replace unfettered competition . . . with regulation." 670 F.2d at 825. In its opinion a finding of state action immunity is not precluded "merely because of the presence of some private decision making pursuant to a clearly articulated state policy that is actively supervised by a state entity even though the supervision does not rise to the level of compulsion." 670 F.2d at 823 n.8.[20]

In *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority*, 475 F. Supp. 711 (D.D.C.

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[20] *See also, Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 274-75 (9th Cir. 1982) (*Midcal* followed with no mention of compulsion).

1979), *aff'd per curiam*, No. 70-1658 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), the District of Columbia Circuit affirmed *per curiam* the decision of the district court granting summary judgment to both a state agency and private defendants on the basis of the state action doctrine. The complaint alleged a conspiracy involving both sets of defendants to monopolize ocean transportation between Puerto Rico and U.S. ports. The court found that "Parker is . . . applicable to suits against private parties whose actions are compelled *or regulated* by the state." 475 F. Supp. at 723 (emphasis added). The court suggested that the presence or absence of compulsion could in certain circumstances serve as a useful measure of the intent of the state to displace competition but that in the instant case such an intent was apparent on the face of the state enabling legislation, making the presence or absence of compulsion irrelevant.

Similarly, in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3842 (U.S. May 11, 1983) (No. 82-1832), and *Gold Cross Ambulance v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), the Seventh and Eighth Circuits held that a municipality need not be compelled by a state to take anticompetitive action for the state action doctrine to be applicable. Although the defendants in both cases were municipalities rather than private parties, each court determined a sufficient state policy to displace competition exists if the challenged activity is a necessary or reasonable consequence of engaging in the authorized activity. In the words of the *Hallie* court:

> [A]ny municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized or in the form of a prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would be state action. 700 F.2d at 377.

The same standard should be applied here.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to review the decision below and should consider this case together with *Hoover v. Ronwin* (in which a writ of certiorari has been granted) and *Southern Motor Carriers Rate Conference, Inc. v. United States* (in which a petition for a writ of certiorari is pending). Alternatively, the Court should defer consideration of this petition until decisions have been rendered in the *Hoover v. Ronwin* and *Southern Motor Carriers* cases.

Respectfully submitted,

JOHN F. GRAYBEAL
(Counsel of Record)
JAY N. VARON
FOLEY, LARDNER,
HOLLABAUGH & JACOBS
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-5300

JOHN C. CHRISTIE, JR.
STEPHEN J. LANDES
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
Attorneys for Petitioner

Of Counsel:
NEIL S. CUMSKY
7240 N. 10th Avenue
Phoenix, Arizona 85021
(602) 944-6398

LEON R. GOODRICH
OPPENHEIMER, WOLFF, FOSTER,
SHEPARD & DONNELLY
1700 First Bank Bldg.
St. Paul, Minn. 55101
(612) 227-7271

August 1, 1983

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-5130
D.C. No. CIV 80-769 PHX CAM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TITLE INSURANCE RATING BUREAU OF ARIZONA, INC.,
Defendant-Appellant.

[Filed Mar. 7, 1983]

On Appeal from the United States District Court
for the District of Arizona

C. A. Muecke, Chief District Judge, Presiding

Argued and Submitted—October 15, 1982

OPINION

Before: POOLE and BOOCHEVER, Circuit Judges, and McNICHOLS,* Senior District Judge.

BOOCHEVER, Circuit Judge:

The United States, Arizona and two private plaintiffs sued the Title Insurance Rating Bureau of Arizona, Inc. ("TIRBA") for fixing the prices of escrow services.

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* The Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.

Plaintiffs were granted summary judgment, despite two defenses offered by TIRBA: the McCarran-Ferguson Act exemption for the "business of insurance" and the state action immunity. The judgment of the district court is affirmed.

FACTS

TIRBA is a title insurance rating bureau licensed by the State of Arizona. It has thirteen insurer members and additional subscribers, all engaged in the business of title insurance.

Prior to 1977, Arizona law required title insurers to file only their title insurance rates with the state director of insurance. Ariz. Rev. Stat. Ann. § 20-376 (amended 1977). In 1977, the statute was amended to require title insurers to file their rates charged for escrow services. Ariz. Rev. Stat. Ann. § 20-376 (West Supp. 1982-1983). A title insurer was allowed to file its own rates, or, at its option, to have a title insurance rating bureau of which it was a member or subscriber file rates on its behalf. Ariz. Rev. Stat. Ann. §§ 20-376 (A-C). The statute authorizes but does not require cooperative action by title insurance companies in rate making.

In October and November 1977, TIRBA's Board of Directors held a series of meetings at which escrow rates for services performed by title insurers and their agents were discussed and classified. On November 7, the TIRBA Board approved its rate schedule for escrow services and authorized its submission to the Arizona Department of Insurance. The schedule was delivered to the department, which approved it. Amendments, corrections and additions were filed over the next few months, which were also approved.

On September 23, 1980, the United States filed this action pursuant to section 4 of the Sherman Act, 15 U.S.C. § 4 (1976), to enjoin and restrain TIRBA from

engaging in continuing violations of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Specifically, the government alleged that TIRBA, its members, and its subscribers engaged in an illegal combination to fix and maintain fees for escrow services in Arizona. Two private actions were filed by individual plaintiffs on their own behalf and as representatives of the class of those who had purchased escrow services in the state after September 23, 1976. The State of Arizona filed a complaint similar to the one filed by the United States, for itself and 100 political subdivisions of the state which had purchased escrow services, and as *parens patriae* on behalf of all persons in the state who had purchased escrow services. The private plaintiffs and the state sought treble damages as well as injunctive relief. These parties settled their claims with TIRBA and are not affected by this appeal.

On June 23, 1981, the district court granted the federal government's motion for summary judgment and denied TIRBA's motion for summary judgment. *United States v. Title Insurance Rating Bureau of Arizona, Inc.*, 517 F. Supp. 1053 (D. Ariz. 1981). On December 21, 1981, the district court entered a final judgment in favor of the United States.

Two issues are presented in this appeal:

1. Is the provision of escrow services by title insurers part of the "business of insurance" exempted from the Sherman Act by the McCarran-Ferguson Act?

2. Is uniform price setting by title insurance immune from the Sherman Act under the state action doctrine where state law allows insurers to file their rates through a rating bureau?

DISCUSSION

I.

Standard of Review

The parties have stipulated to the facts. The questions presented are solely issues of law. On an appeal from summary judgment, this court's review is identical to that of the trial court, *i.e.*, a *de novo* determination of the legal issues involved. *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980).

II.

McCarran Act Exemption

Various title insurers jointly set their prices for escrow services and filed those rates with the state through TIRBA. Section 2(b) of the McCarran Act provides that the federal antitrust laws shall be applicable to the "business of insurance" to the extent that such business is not regulated by state law. 15 U.S.C. § 1012(b) (1976). Thus, the question is whether the provision of escrow services by title insurance companies is part of the business of title insurance.

In considering the McCarran Act exemption it is important to keep in mind the Supreme Court's warnings that the exemption is a limited one; it is to be narrowly construed; and that it exempts the "business of insurance" and not the "business of insurance companies." *Union Labor Life Insurance Company v. Pireno*, 102 S. Ct. 3002, 3007, 3010 (1982). Also, it is not dispositive that Arizona law defines the "business of title insurance" to include "the performance by a title insurer or title insurance agent of escrow services," Ariz. Rev. Stat. Ann. § 20-1562(2)(b) (West Supp. 1982-1983), because the definition of "business of insurance" for McCarran Act purposes is a matter of federal law. *Securities and Exchange Commission v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 69 (1959).

The Supreme Court has discussed the meaning of the "business of insurance" in several recent cases. None, however, discusses title insurance.

In *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, *reh'g denied*, 441 U.S. 917 (1979), Blue Shield entered into agreements with pharmacies whereby participating pharmacies would supply prescription drugs at their cost plus $2. A nonparticipating pharmacy brought an antitrust action alleging a price fixing agreement between Blue Shield and the participating pharmacies. Blue Shield defended on the basis that the agreements were part of the "business of insurance" under § 2(b) of the McCarran Act.

The Supreme Court disagreed. Looking to the structure of the McCarran Act and its legislative history, the Court discussed three characteristics of the "business of insurance" that Congress had intended to exempt through § 2(b).

First, the Court observed that parts of the legislative history of the Act "strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk." 440 U.S. at 220-21. Blue Shield's Pharmacy Agreements did not spread or underwrite risks; they merely enabled Blue Shield to minimize costs in supplying drugs and thus to maximize profits.

Second, in enacting the McCarran Act, Congress had been concerned with the "relationship between insurer and the insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.'" 440 U.S. at 215-16. The Pharmacy Agreements were not "between insurer and insured." The mere fact that the agreements resulted in cost savings which might result in lower insurance premiums bears too tenuous a relationship to the business of insurance to be controlling. If accepted, this argument would shield as the business of insurance al-

most every decision made by an insurance company resulting in enhanced income or lower costs.

Finally, the Court noted that in enacting the McCarran Act the primary concern of Congress was to exempt cooperative ratemaking from the antitrust laws. Therefore, the exemption is limited to parties within the insurance industry. Thus, the § 2(b) exemption was inapplicable because the Pharmacy Agreement was with druggists, who are wholly outside the insurance industry.

Recently, the Supreme Court reaffirmed the *Royal Drug* analysis of the McCarran Act in *Union Labor Life Insurance Co. v. Pireno*, 102 S. Ct. 3002 (1982). Union Labor Life Insurance ("ULL") issued health insurance policies covering certain chiropractic treatments, but limited the company's liability to "reasonable" charges for "necessary" medical care and services. ULL arranged with the State Chiropractic Association to use the advice of its Peer Review Committee to determine reasonable charges and necessary services. On several occasions the Committee determined that Pireno's treatments were unnecessary or his charges unreasonable. Pireno sued, alleging that ULL had used the Committee's peer review practices as a vehicle for a conspiracy to fix prices. ULL contended that its use of the Peer Review Committee was part of its "business of insurance."

The Supreme Court disagreed, finding *Royal Drug* to be controlling. First, ULL's use of the Peer Review Committee played no part in the spreading or underwriting of the policyholder's risk. Second, ULL's use of the Committee was not an integral part of the policy relationship between the insurer and the insured. The use of the Committee to evaluate claims is separate and distinct from the contract between ULL and the insured, and at most results in a cost savings to ULL. Finally, with regard to the third *Royal Drug* criterion, it is plain that the peer review practices were not limited to entities within the insurance industry.

In applying the *Pireno-Royal Drug* criteria to the escrow situation, none of the cases cited by the parties are particularly helpful. The cases cited by TIRBA are closer factually,[1] but were decided prior to *Royal Drug*, when "an expansive perception of the 'business of insurance' requirement prevailed in a majority of the circuit courts of appeals." *Portland Retail Druggists Association v. Kaiser Foundation Health Plan*, 662 F.2d 641, 647 (9th Cir. 1981). The cases cited by the government generally have the proper emphasis on risk spreading as an essential element of the business of insurance, but are less similar factually. We, therefore, shall proceed with our independent analysis of the criteria applicable to the facts of this case.

The first *Pireno-Royal Drug* requirement is that the practice have the effect of transferring or spreading risk. TIRBA contends that performance of escrow services is crucial to underwriting and spreading risks in that title insurers evaluate and define the risk to be insured during escrow. First, the escrow agent reviews documents demonstrating the removal of encumbrances which would otherwise have to be excluded from insurance coverage. Second, the escrow officer reviews documents which are not a part of the public title records, but bear on the state of the title and the risk of defects. Third, the escrow officer is the only representative of the insurer who has personal contact with the parties to the real estate

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[1] *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77 (10th Cir. 1973); *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974). *Schwartz* considered an agreement by title insurers to fix prices through a rating bureau for "seller charges." The services provided for "seller charges" were essentially escrow services. 374 F. Supp. at 566 n.2. The court held these services to be within the business of title insurance, but the expansive analysis of the McCarran Act clearly does not comport with *Royal Drug*. *See* 374 F. Supp. at 572-75.

transaction, and thus, by requiring identification, is best able to detect forgeries.

The government denies the centrality of the escrow process to the definition and acceptance of risk. The government characterizes the escrow agent as a stakeholder performing merely ministerial functions. First, TIRBA members and subscribers have set prices for a broad range of escrow services where title insurance is not purchased, as for example where the escrow agent acts as the collection agent of a long term real estate-related debt. In this situation, the escrow activities are clearly not the business of insurance. Second, in the typical escrow situation, the escrow agent merely transfers title from seller to buyer and consideration for title from buyer to seller. Any other services provided by escrow agents are purely administrative with no unique insurance characteristics. Third, the use of escrow agents by title insurers to perform services that the title insurer could perform itself, such as verifying that liens have been removed, at most reduces costs to the insurer. But *Pireno* and *Royal Drug* both rejected the argument that mechanisms that merely reduce costs to the insurer are part of the business of insurance. 102 S. Ct. at 3010; 440 U.S. at 216-17.

We therefore conclude that the escrow process itself does not spread or underwrite title insurance risk.

The second requirement under *Pireno* and *Royal Drug* is that the challenged practice is an integral part of the policy relationship between the insurer and the insured, as opposed, for example, to Blue Shield's Pharmacy Agreements in *Royal Drug*, which were side agreements for the purchase of drugs at a low price. TIRBA contends that the policy relationship is here at issue because the escrow process is essential in determining what risks will be accepted by the title insurer. The government counters that buying escrow services is separate

from buying title insurance. First, some people who buy escrow services do not buy title insurance, and vice versa. Second, those who buy both enter into two separate agreements: one for title insurance, the other for escrow services. Third, escrow services are performed either by a separate department within insurance companies, or by independent agents who keep the entire escrow fee. In fact, three TIRBA participants do not perform escrow services at all, and exclusively use outside companies.

The final *Pireno-Royal Drug* criterion for the business of insurance is that the challenged practice must be limited to entities within the insurance industry. This requirement derives from Congress' intent to exempt joint ratemaking from the antitrust laws where authorized by state law. Thus, TIRBA's activity would seem at first glance to satisfy the third requirement. However, Congress seems to have envisioned a total horizontal restraint. The complication is that other entities besides insurance companies perform escrow services, so that immunizing price-setting by insurance companies who perform escrow services would distort competition by those who are not insurance companies. In *Perry v. Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979), *cert. denied*, 446 U.S. 987 (1980), an insurance company offered loans to finance insurance premium payments. The Fifth Circuit held that the loan operation by the insurance company was not part of the business of insurance:

> It would be anomalous to hold that Fidelity's premium financing activities are the "business of insurance" but that the identical activities of the finance company . . . are not. The appropriate focus is thus the nature of the activity itself, not the type of business that is conducting it. . . . [B]usiness activities of insurance companies not peculiar to the insurance industry are outside the scope of the "business of insurance."

606 F.2d at 470.

We conclude that application of the *Pireno-Royal Drug* criteria clearly indicates that performance of escrow services is not the "business of insurance" for the purposes of the McCarran Act exemption.

III.

State Action Immunity

Arizona law allows title insurers to file escrow rates through an insurance rating bureau. TIRBA argues that it is thus entitled to the state action immunity.

The Supreme Court recently restated the requirements for the state action immunity in *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980).

> These decisions establish two standards for antitrust imunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

445 U.S. at 105 (citation omitted).

TIRBA points to several sections of the Arizona Code regulating escrow filings that arguably articulate a state policy. Section 20-341 provides that "The purpose of this article is to . . . authorize and regulate cooperative action among insurers in rate making . . ." Ariz. Rev. Stat. Ann. § 20-341 (1975). Section 20-357(A) lists factors to be considered in setting rates. Rates should be neither excessive nor inadequate for the safety and soundness of any title insurer, should promote stable rate structures, should encourage the growth in assets of title insurers, and should allow for the payment of dividends in order to attract capital. Ariz. Rev. Stat. Ann. § 20-375(A) (West Supp. 1982-1983). (The listing of factors in the statute is not exclusive.) This section suggests that the stability and growth of title insurers were more important goals

of the state legislature than restricting competition in the escrow industry.

The government points to other more relevant language in § 20-341: "Nothing in this article is intended to prohibit or discourage reasonable competition, or to prohibit or encourage, except to the extent necessary to accomplish the purpose stated in this section, uniformity in insurance rates . . ." This reflects neutrality by the Arizona legislature to competition and uniform rates, not "a clearly articulated and affirmatively expressed state policy."

Importantly, the state does not require uniform rates: it allows a title insurer to file independent rates separately, to file independent rates through a rating bureau,[2] or to deviate from rates filed by a rating bureau on its behalf. Ariz. Rev. Stat. Ann. §§ 20-375(A), 20-376(B), 20-376(C), 20-379 (West Supp. 1982-1983).

The most that can be said for TIRBA's position is that the statute authorizes cooperative action in rate-making. This does not constitute a clearly articulated and affirmatively expressed state policy to restrict competition. Because we find that the challenged practice was not supported by a clearly articulated and affirmatively expressed state policy, we do not consider *Midcal's* second requirement, that the state must actively supervise its anti-competitive policy.

CONCLUSION

Neither the McCarran Act exemption nor the state action immunity is available to the challenged practices of TIRBA. The judgment of the district court is

AFFIRMED.

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[2] The relevant factors for determining escrow prices listed in Ariz. Rev. Stat. Ann. § 20-377 (West Supp. 1982-1983) seem to suggest that individually set prices should be used even if prepared and filed by a rating bureau. *See also* Ariz. Rev. Stat. Ann. § 20-375(A) (West Supp. 1982-1983). *But see* § 20-341 (1975).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-769 PHX CAM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TITLE INSURANCE RATING BUREAU OF ARIZONA, INC.,
Defendant.

No. CIV 80-840A PHX CAM

IN RE ARIZONA ESCROW FEE ANTITRUST LITIGATION

No. CIV 80-996 PHX CAM

STATE OF ARIZONA, *et al.*,
Plaintiffs,

vs.

TITLE INSURANCE RATING BUREAU OF ARIZONA, INC., *et al.*,
Defendants.

No. CIV 80-840 PHX CAM

ERIC and LESLIE VAUGHN,
Plaintiffs,

vs.

TITLE INSURANCE RATING BUREAU OF ARIZONA, INC., *et al.*,
Defendants.

No. CIV 80-885 PHX CAM

DWIGHT C. LUNDELL,
Plaintiffs,

vs.

TITLE INSURANCE RATING BUREAU OF ARIZONA, INC., *et al.*,
Defendants.

[Filed June 23, 1981]

OPINION AND ORDER

The plaintiffs herein, the United States of America, the State of Arizona, and two private plaintiffs, seek a summary determination that defendants, a title insurance rating bureau and its individual members and subscribers, are guilty of price fixing as proscribed by Section 1 of the Sherman Act. 15 U.S.C. § 1.

In response, defendants have filed a Motion for Summary Judgment and a Motion to Dismiss, arguing that they are immune from antitrust liability. Defendants are of the position that they are engaged in the business of insurance and that their activities are regulated by the State of Arizona, bringing them within two of the traditional exemptions from the sweep of the Sherman Act. One defendant has submited a Motion to Dismiss, asserting that theirs is protected Noerr-Pennington activity,[1] and it is therefore immune from antitrust liability.

The parties agree that there are no material issues of fact; they simply seek a judicial determination as to whether the defendants are within an exemption to the antitrust laws.

BACKGROUND

In 1977 the Arizona Legislature passed House Bill 2316 requiring, *inter alia*, that title insurance companies file a schedule of rates for the escrow services they were performing. *See* A.R.S. § 20-376(A & B). The Director of Insurance was charged with the review and approval of such rates when satisfied that they served the public welfare. A.R.S. § 20-376(D), § 341. The legislation required that the filings be submitted within ninety (90) days of its date of effect, August 27, 1977.

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[1] ***Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.***, 365 U.S. 127 (1961); and ***United Mine Workers v. Pennington***, 381 U.S. 657 (1965).

Defendant Title Insurance Rating Bureau of Arizona, Inc., TIRBA, is a title insurance rating organization licensed under Arizona law. It has thirteen members and a greater number of subscribers, all of which are engaged in the business of title insurance.

As part of their services, most of the defendant insurance companies provide escrow services. In October and November, 1977, the TIRBA Board of Directors held a series of meetings at which escrow rates and services for the title insurers and their agents were discussed and classified. On November 9, 1977, the TIRBA Board of Directors approved the "Schedule of Escrow Services Rates, Manual of Classifications and Rules and Plans Relating Thereto" and authorized its submission to the Arizona Department of Insurance. On November 14, 1977, TIRBA delivered its Schedule to the Department as its initial filing of escrow rates. The schedule stated that it was filed "on behalf of members and subscribers to the services of said Rating Bureau." As per Arizona law, the filing became effective fifteen days after it was filed. A.R.S. § 20-376(E). Subsequently, in December 1977 and January of 1978, TIRBA, on behalf of its members, filed amendments to its escrow rates, which amendments have been accepted by the Department. In April of 1978, TIRBA, again on behalf of its members and subscribers, submitted a correction of certain earlier filed rates and additional rates for certain services. In December of 1978, TIRBA filed a revised Schedule which recoded certain escrow classifications or rates.

The effect of these filings is that since at least 1977, a uniform price has been charged for escrow services by the title insurance companies in Arizona. Although authorized by A.R.S. § 20-379, none of the companies has filed deviations from the rating bureau schedule or chosen to subscribe to only some of the rating bureau's filings, but all of the companies have charged the same price for their services.

On September 23, 1980, the United States Department of Justice filed suit against TIRBA, alleging that the rating bureau and its members had engaged in an unlawful conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act. The complaint sought injunctive relief preventing the continuation of the conspiracy and cancelling the joint escrow rate filings.

On December 1, 1980, the State of Arizona, on its own behalf, as representative of governmental entities within the State that have purchased escrow services, and as *parens patriae* on behalf of all natural persons residing in the State who had purchased escrow services, filed a complaint similar to the one filed by the United States. In addition to praying for injunctive relief against TIRBA and its members, the complaint sought treble damages as provided by Section 4 of the Clayton Act. 15 U.S.C. § 15.

During December 1980, two private actions were filed by individual plaintiffs on their own behalf and as representatives of a class of all others similarly situated. These actions sought injunctive relief and treble damages. The private complaints also named the Arizona Director of Insurance as a defendant and sought to enjoin him from implementing any of the provisions of Arizona law which related to the setting, filing, posting or adherence to escrow rates by title insurers. The Director has subsequently been dismissed from the suits.

The defendants' answers have framed two defenses which they still maintain: first, that the complaint concerns activities constituting the business of insurance, a business exempted from the antitrust laws by the McCarran-Ferguson Act, 15 U.S.C. § 1101 *et seq*; and second, that the defendants' activities were undertaken pursuant to a scheme of state regulation as required by state law.

On March 26, 1981, defendant Transamerica Title Insurance Company filed a Motion for Partial Judgment on the Pleadings which essentially raised a third defense: that the activities of the defendant companies in response to Arizona law could not be the basis for liability under the Sherman Act because the actions were protected expression and thereby insulated from liability by the Noerr-Pennington Doctrine.

THE BUSINESS OF INSURANCE

Section 2(b) of the McCarran-Ferguson Act provides that the federal antitrust laws shall not be applicable to the business of insurance so long as that business is state regulated. 15 U.S.C. § 1012(b). In this case, there is no dispute that the insurance business is regulated by the State of Arizona. The issue in contention is whether escrow services constitute the business of insurance.

Although the State of Arizona has promulgated statutes which indicate that it considers escrow services to be the business of insurance, a state's determination is not conclusive. *SEC v. Variable Annuity Life Insurance Co. of America*, 359 U.S. 65 (1959). The definition of "insurance" in the McCarran-Ferguson Act context is a federal question. *Id.* at 69.

The standard-setting opinion in this area of the law is *Group Life and Health Insurance Company v. Royal Drug Co.*, 440 U.S. 205 (1979). In that case, owners of independent pharmacies brought suit against Blue Shield insurance plan and owners of three pharmacies alleging that the defendants had fixed prices and formed an illegal group boycott by entering into agreements which set a formula for reimbursement on prescription drugs provided to Blue Shield policyholders.

In holding that the agreements were not within the McCarran Act exception, the Court distinguished between the "business of insurance" and the "business

of insurers," stressing that the exception only applied to the former. In defining the parameters of the business of insurance, the Court found: (1) a key determinant in identifying such business is the spreading and underwriting of risk, as distinguished from mere cost minimization arrangements; and, (2) another significant aspect of such business relates to the contract between the insurer and the insured, as distinguished from arrangements between the insurer and third parties.

The *Royal Drug* Court noted that while the agreements with the pharmacies could reduce Blue Shield's costs and ultimately the expense to its policyholders, they were not the business of insurance since they did not involve any underwriting or cost-spreading, nor were they contracts between the insurer and the insured.

In the present case, the contract is between the insurer and the insured, leaving for analysis only whether escrow services underwrite or spread risks amongst the policyholders. The defendants contend that the performance of escrow services allows the agents to evaluate and minimize the risk of loss under a title insurance policy; they posit that risk evalution is an integral part of the underwriting process.

Not unexpectedly, the plaintiff's assert that escrow services lack the indispensible characteristic of risk-spreading or underwriting. An escrow is defined as a transaction where something is delivered to a disinterested third party, who holds it until a specified event occurs or does not occur. *See* A.R.S. § 6-801(1). An escrow agent is a fiduciary who acts pursuant to the parties' instructions. The plaintiffs characterize the agent as a stakeholder performing ministerial functions.

The plaintiffs also point out that escrow services are performed not only by insurers, but also by lending institutions, lawyers and independent escrow companies. They emphasize that when a title insurance company

performs escrow services, none of the fee therefore goes to the insurance principal; all is retained by the agent performing the service.

The distinct difference between insurance and escrow services is further evidenced by the fact that three of the defendants herein, Stewart Title, U.S. Life Title, and Safeco Title Insurance have stated that they operate in Arizona exclusively through agents and that they are not in the escrow business at all.

While the defendants have relied on three pre-*Royal Drug* cases,[2] the plaintiffs have cited a trilogy of post-*Royal Drug* cases from the Fifth Circuit: *Cochran v. Paco Inc.*, 606 F.2d 460 (5th Cir. 1979); *Perry v. Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979); and *Cody v. Community Loan Corp. of Richmond County*, 606 F.2d 499 (5th Cir. 1979). Therein, the circuit court held that an insurance company's premium financing in connection with the sale of an insurance policy and credit sale of insurance, were not the business of insurance within the meaning of the McCarran-Ferguson Act. In *Perry*, the Fifth Circuit noted that the apropriate focus is not upon the entity performing the activity, *i.e.*, the insurance company, but upon the nature of the activity itself. 606 F.2d at 470.[3]

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[2] *Commander Leasing Co. v. Transamerica Title Insurance Co.*, 477 F.2d 77 (10th Cir. 1973); *Schwartz v. Commonwealth Land Title Insurance Co.*, 374 F.Supp. 564 (E.D.Pa. 1974); and *McIlhenny v. American Title Insurance Co.*, 418 F.Supp. 364 (E.D.Pa. 1976), none of which consider the concept of underwriting or risk-spreading in their analysis of the business of insurance.

[3] The plaintiffs have also directed the Court's attention to the very recent case of *Pireno v. New York State Chiropractic Assn.*, —— F.2d ——, 1981-1 Trade Cas. § 64.047 (2d Cir. 1981). Therein, the circuit court reversed the trial court in finding that a chiropractic association's peer review system designed to assess the reasonableness of practitioners' fees on behalf of insurance companies was not "the business of insurance" in that it did not underwrite or spread risks.

Focusing on the activity, the *Royal Drug* opinion admonished:

> There is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk. 440 U.S. 214-15.

Unquestionably, when the same entity performs both the escrow services and provides the title insurance, these respective duties are performed very closely in time. Nevertheless, they are distinctively different functions. While a company providing title insurance may reduce its costs by executing the accompanying escrow duties, there is not any actual underwriting or risk-spreading involved in the performance of the escrow duties.

Exemptions from the antitrust laws are to be narrowly construed. *Abbott Laboratories v. Portland Retail Druggist Association Inc.*, 425 U.S. 1 (1976). Furthermore, the McCarran-Ferguson Act is to be narrowly construed in the face of valid federal regulatory interests. *SEC v. Republic National Life Insurance Co.*, 378 F.Supp. 430, 436 (S.D.N.Y. 1974). In providing customers with escrow services title insurance companies do not underwrite or spread risks amongst their policy holders. As a consequence, escrow services are not the business of insurance and therefore not within the McCarran-Ferguson Act exemption from the antitrust laws.

STATE ACTION

The defendants have alternatively asserted that they are immune from antitrust liability under the doctrine of state action, as articulated by *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. In essence, the defendants assert that the State of Arizona, through the

regulation of the Department of Insurance, has taken the escrow industry from the competitive marketplace and subjected it to state regulation, guaranteeing that the services and rates will be in the citizenry's best interest.

The defendants' argument, however, runs contrary to both the caselaw defining the scope of the state action exemption and the legislative history surrounding Arizona law regarding escrow services.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court announced the threshold requirement that the state must compel the challenged conduct before the doctrine will shield liability. The defendant takes the position that compulsion is no longer required in light of the Court's recent opinion in *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). However, *Midcal* approvingly quotes *Goldfarb* in regards to the compulsion requirement. *Id.* at 104. Furthermore, under the facts presented in *Midcal*, there was no reason to dwell on the necessity of compulsion.

Since the issues raised by a state or private party in invoking the state action defense are very different, the Supreme Court has recognized that the identity of the defendant is relevant in determining the extent of state action immunity. *See City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978). In fact, the plurality in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), questioned the right of a private defendant to invoke the defense at all.

Under the Court's reasoning in *Goldfarb* and *Cantor*, for private conduct to gain immunity from the antitrust laws based on a state action defense, the degree of government involvement must be such that the State compels, by statute or regulation, the private conduct. *Goldfarb*, 421 U.S. at 791. The State must dominate the decision-making so as to significantly diminish the private party's freedom of choice. *Cantor*, 428 U.S. at 593.

The State of Arizona does not compel the title insurance companies to charge a uniform rate for escrow services. The State has not sought to take the escrow service business out of the competitive field and regulate it as, for example, a state monopoly. The 1977 escrow legislation adopted a policy in favor of competition. In three separate provisions the legislature provides that a title insurer has the choice of filing its own escrow rates or having its rates filed by a rating organization. A.R.S. §§ 20-375(A), 376(B) and 376(C). Rating bureaus and subscribers are guaranteed the right to file deviation rates and to subscribe to some, but not all, of the rates filed by a rating bureau. A.R.S. § 20-379. These rights "are provided so that competitive rates may inure to the benefit of the public." *Pacific Fire Rating Bureau v. Insurance Company of North America*, 83 Ariz. 369, 375; 321 P.2d 1030, 1034 (1958).

The fact that the legislature did not uniformly fix rates has been admitted by some of the individual defendants in discovery. Further, the history of the escrow legislation reveals that the legislature explicitly decided not to give title insurers and agents immunity from the state antitrust laws. Minutes of Meeting, Committee on Commerce, April 4, 1977. Additionally, Arizona law provides that:

> Nothing in this article is intended to prohibit or discourage reasonable competition, or to prohibit or encourage, except to the extent necessary to accomplish the purpose stated in this section, uniformity in insurance rates, rating systems, rating plans or practices. . . . A.R.S. § 20-341.

Proponents of the legislation stressed the competitive features of the law in testimony before the legislature. The Department of Insurance testified that "regulation of rates will help competition." Minutes of Meeting, Senate Committee on Agriculture, Commerce, and Labor, April 28, 1977.

There is a presumption against implied exclusions from coverage under the antitrust laws. *Lafayette v. Louisiana Power, supra* at 399. Given the Court's findings that the Arizona legislature did not intend to replace competition with public regulation of escrow rates and that the regulatory scheme adopted does not compel the defendants to fix prices, the Court concludes that the defendants may not successfully interpose the state action defense between its conduct and antitrust liability.

NOERR-PENNINGTON DOCTRINE

Defendant Transamerica Title Insurance Company has filed a Motion for Judgment on the Pleadings which seeks to avoid liability by asserting that all of the defendants' conduct is protected expression and therefore insulated from liability by the Noerr-Pennington Doctrine.

Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) established the general rule that lobbying and other similar activities by business-persons to obtain legislative and executive action does not violate the antitrust laws, even though such legislation is intended to eliminate competition or otherwise restrain trade. In essence, the Court has deemed the right to petition so important so as to subordinate considerations of competition when the two clash. Von Kalinowski, 7 *Antitrust Laws and Trade Regulation*, § 46.04, p. 46-35 and 36.

In this case the parties have conceded that any activity taken by the defendants while preparing to and petitioning the legislature in connection with escrow legislation is protected and will not form the basis for any claim herein. The defendants, however, have also claimed that their rate filings with the Arizona Department of Insurance, their approval, and subsequent implementation, are activities protected under the Noerr-Pennington Doctrine.

This Court views the Doctrine as one which protects activities undertaken to modify or change the laws, whether laws were promulated by the legislature or a regulatory agency. The defendants' attempt to shoehorn rate filings, which are required by law to be done, into a protected activity, misapprehends the caselaw and the underlying policy. The mere filing of something required by law does not in any way invoke the right to petition. The defendants' filing of its rates is not an attempt by an individual or entity to employ the democratic process in order to effectuate change; it is mere compliance with the law.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1979), an anticompetitive regulation was written by a utility and approved by the regulatory commission. The defendant utility sought protection under the Noerr-Pennington Doctrine. The Court responded:

> Moreover, nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

The filing that the defendants engage in here with the Department of Insurance is no more protected expression than was that of the utility in *Cantor*. As there, the defendants' Noerr-Pennington defense must be rejected.

CONCLUSION

With this litigation, the parties seek a judicial determination as to whether the defendants' activities falls within or without an exception to the antitrust laws. There are no material facts in controversy: escrow services have been available since at least 1977, only at a uniform price charged by all of the defendants. The

plaintiffs have alleged that this is a manifestation of illegal price-fixing as proscribed by Section 1 of the Sherman Act.

The defendants have responded by alleging that their providing escrow services is part of the business of insurance and thereby immune from antitrust liability as provided by the McCarran-Ferguson Act. As escrow services do not underwrite or spread risk amongst all title insurance policyholders, such activity does not constitute the business of insurance. *Royal Drug, supra.*

The defendants have also alleged immunity on the ground that their's is a state regulated industry and that they are exempt from antitrust proscriptions under the State Action doctrine. *Parker, supra.* The State's legislative scheme does not compel the private defendants' uniform rate filing. *Lafayette*; *Cantor, supra.* A review of the Arizona statutes, A.R.S. §§ 20-375 through 379, and the legislative history of the Arizona law regulating escrow services also reveals that the State had no intention of supplanting competition with a purported state regulation providing for fixed prices in the escrow services field.

Defendant Transamerica Title has also sought to insulate itself from antitrust liability by alleging that all of the defendants' activities in filing its proposed rates with the Department of Insurance, their approval and subsequent implementation constitutes expression entitled to protection under the Noerr-Pennington Doctrine. As this activity in no way seeks to change the existing law, but merely conforms to existing law, the right to petition is not implicated. The defendants' filing of their rates with a state regulatory agency is not sufficient for conferring antitrust immunity on the conduct. *Cantor, supra.*

The defendants have earlier in this litigation insisted that their activities were not interstate commerce and

therefore, this Court was without jurisdiction. The record reveals that the activities do constitute interstate commerce, and the defendants have conceded such in discovery and in stipulating to the facts necessary to this summary disposition.

As another juncture, the defendants suggested that price-fixing, as alleged in the plaintiffs' complaints, should not be considered a *per se* violation of the antitrust laws. They suggested that the court employ the rule of reason in evaluating defendants' activities. As such an assertion flies in the face of decades of legal thought and reasoning, such an argument cannot be accepted by this Court.

Based upon the foregoing,

IT IS ORDERED that the United States of America's Motion for Summary Judgment is granted, while the defendant, TIRBA's Countermotion for Summary Judgment is denied.

IT IS FURTHERED ORDERED that the State of Arizona's Motion for Partial Summary Judgment is granted.

IT IS FURTHER ORDERED that plaintiffs Lundell and Vaughn's Motion for Partial Summary Judgment is granted.

IT IS FURTHER ORDERED that defendant Transamerica Title Insurance Company's Motion for Judgment on the Pleadings is denied.

IT IS FINALLY ORDERED that the plaintiffs, United States of America, State of Arizona and Lundell and Vaughn submit proposed forms of judgment in reference to this Opinion and Order.

DATED this 23rd day of June, 1981.

/s/ C. A. Muecke
C. A. MUECKE
Chief Judge

APPENDIX C

ARIZONA REVISED STATUTES—Title 20

§ 20-341. *Purpose of insurance rate regulation*

The purpose of this article is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate cooperative action among insurers in rate making and in other matters within the scope of this article. Nothing in this article is intended to prohibit or discourage reasonable competition, or to prohibit or encourage, except to the extent necessary to accomplish the purpose stated in this section, uniformity in insurance rates, rating systems, rating plans or practices. This article shall be liberally interpreted to carry into effect the provisions of this section.

§ 20-342. *Scope and application of article; definition*

A. Nothing contained in this article shall apply to:

1. Life insurance.

2. Disability insurance.

3. Reinsurance, except joint reinsurance as provided in 20-369.

4. Insurance against loss of or damage to aircraft, their hulls, accessories and equipment, or against liability, other than employers' liability, arising out of the ownership, maintenance or use of aircraft.

5. Insurance of vessels or crafts, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine, as distinguished from inland marine, insurance policies.

B. Rates for the types of insurance included in § 20-382 are only subject to §§ 20-381 through 20-399.

C. This section and §§ 20-341 and 20-356 through 20-374 apply to risks subject to § 20-360, medical mal-

practice insurance, workmen's compensation and employers' liability insurance incident to and written in connection with workmen's compensation on risks or operations in this state.

D. This section and §§ 20-341 and 20-361 through 20-379 shall apply to title insurance on risks located in this state and to escrow services performed by a title insurer or title insurance agent as defined in § 20-1562. Such sections are designated as the title insurance rate regulatory provisions of this article and are the only sections of this article which apply to title insurance.

E. In this article, "workmen's compensation rates" means rates for workmen's compensation and employers' liability insurance incident to and written in connection with workmen's compensation.

§ 20-357. *Filing of rating system*

A. Every insurer shall file with the director the rating systems which it proposes to use. As used in the rate regulatory provisions of this article the term "rating systems" includes every manual of classifications, rules and rates, every rating plan, and every modification of any of the foregoing. Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports the filing, and the director does not have sufficient information to determine whether the filing meets the rate regulatory requirements of this article, he shall require the insurer to furnish the information upon which it supports the filing. The information furnished in support of a filing may include the experience or judgment of the insurer or rating organization making the filing, its interpretation of any statistical data upon which it relies, the experience of other insurers or rating

organizations, or any other relevant factors. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

B. An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the director to accept on its behalf filings made by the rating organization.

C. Each filing shall be on file for a waiting period of fifteen days before it becomes effective. Upon written application by the insurer or rating organization making the filing, the director may authorize a filing to become effective before the expiration of the waiting period.

D. Upon the written application of the insured, stating his reasons therefor, filed with and approved by the director, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk.

E. No insurer shall make or issue a contract or policy except in accordance with the filings which are in effect for such insurer as provided in the rate regulatory provisions of this article.

§ 20-358. *Disapproval of rates*

A. If at any time the director finds that a filing does not meet the standards set forth in § 20-356, he shall, after a hearing held upon not less than ten days' written notice in which he shall specify the matters to be considered at such hearing, to every insurer and rating organization which made the filing, issue an order specifying in what respects he finds that the filing fails to meet the requirements of the rate regulatory provisions of this article, and stating when, within a reasonable period thereafter, the filing or rating system shall be deemed no longer effective. Copies of the order shall be sent to every such insurer and rating organization. The

order shall not affect any contract or policy made or issued prior to the expiration of the period set forth therein.

B. Any person or organization aggrieved with respect to any filing or rating system which is in effect may make written application to the director for a hearing thereon, but the insurer or rating organization which made the filing or uses the rating system shall not be authorized to proceed under this subsection. The application shall specify the grounds to be relied upon by the applicant. If the director finds that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established and that the grounds otherwise justify holding such a hearing, he shall within thirty days after receipt of the application hold a hearing upon not less than ten days' written notice to the applicant and to every insurer and rating organization which made such filing or uses such rating system. If, after the hearing, the director finds that the filing or rating system does not meet the requirements of the rate regulatory provisions of this article, he shall issue an order specifying in what respects he finds that it fails to meet such requirements and stating when, within a reasonable period thereafter, it shall be deemed no longer effective. Copies of the order shall be sent to the applicant and to every such insurer and rating organization. The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth therein.

C. No manual of classifications, rules, rating plan or any modification of any of the foregoing which establishes standards for measuring variations in hazards or expense provisions, or both, and which is being used pursuant to the requirements of § 20-356, shall be disapproved if the rates thereby produced meet the requirements of the rate regulatory provisions of this article.

§ 20-361. *Licensing of rating organizations*

A. A corporation, an unincorporated association, a partnership or an individual, whether located within or outside this state, may make application to the director for a license as a rating organization for insurance subject to this article and shall file therewith:

1. A copy of its constitution, its articles of agreement or association or its certificate of incorporation, and a copy of its bylaws, rules and regulations governing the conduct of its business.

2. A list of its members and subscribers.

3. The name and address of a resident of this state upon whom notices or orders of the director or process affecting the rating organization may be served.

4. A statement of its qualifications as a rating organization.

B. If the director finds that the applicant is competent, trustworthy and otherwise qualified to act as a rating organization and that its constitution, articles of agreement or association or certificate of incorporation and its bylaws, rules and regulations governing the conduct of its business conform to the requirements of law, he shall issue a license specifying the kinds of insurance, or subdivisions or classes of risks or parts or combinations thereof for which the applicant is authorized to act as a rating organization. Every such application shall be granted or denied in whole or in part by the director within sixty days of the date of its filing.

C. Licenses issued pursuant to this section shall remain in effect for three years unless sooner suspended or revoked by the director. The license may be suspended or revoked by the director, after hearing upon notice, if the rating organization ceases to meet the requirements of this section.

§ 20-362. *Notice to director of changes in rating organization*

Every rating organization shall notify the director promptly of every change in:

1. Its constitution, its articles of agreement or association, or its certificate of incorporation, and its bylaws, rules and regulations, governing the conduct of its business.

2. Its list of members and subscribers.

3. The name and address of the resident of this state designated by it upon whom notices or orders of the director or process affecting the rating organization may be served.

§ 20-363. *Availability of service of rating organization to members and subscribers*

A. Subject to rules and regulations which have been approved by the director as reasonable, each rating organization shall permit any insurer, not a member, to be a subscriber to its rating services for insurance subject to this article for which it is authorized to act as a rating organization. Notice of proposed changes in the rules and regulations shall be given to subscribers.

B. Each rating organization shall furnish its rating services without discrimination to its members and subscribers.

C. The reasonableness of any rule or regulation in its application to subscribers or the refusal of any rating organization to admit an insurer as a subscriber shall, at the request of any subscriber or any such insurer, be reviewed by the director at a hearing held upon at least ten days' written notice to the rating organization and to the subscriber or insurer. If the director finds that the rule or regulation is unreasonable in its application to subscribers, he shall order that the rule or regulation shall not be applicable to subscribers.

D. If the rating organization fails to grant or reject an insurer's application for subscribership within thirty days after it was made, the insurer may request a review by the director as if the application had been rejected. If the director finds that the insurer has been refused admittance to the rating organization as a subscriber without justification, he shall order the rating organization to admit the insurer as a subscriber. If he finds that the action of the rating organization was justified, he shall make an order affirming its action.

E. Every insurer, including the Arizona state compensation fund, writing workmen's compensation insurance in this state shall be a member of a workmen's compensation rating organization. No insurer may at the same time belong to more than one rating organization with respect to such insurance.

F. Such a rating organization shall have as members not less than five insurers authorized to write and who are writing workmen's compensation insurance in this state and whose combined experience is determined by the director to be reasonably adequate for rate-making purposes.

G. In a rating organization of which the Arizona state compensation fund is a member, the Arizona state compensation fund shall be entitled, without election, to membership of any committee thereof established in connection with the operation of the rating organization in this state. One-half of the members of each such committee shall be chosen by the stock insurers and one-half by the nonstock insurers.

H. Neither the provisions of this section nor the rules, regulations or rating plans of a rating organization shall affect or apply to self-rating plans and charges fixed thereunder by the state compensation fund under §§23-983.

§ 20-364. *Technical services*

A. Any rating organization may provide for the examination of policies, daily reports, binders, renewal certificates, endorsements or other evidence of insurance, or the cancellation thereof, and may make reasonable rules governing their submission. Such rules shall contain a provision that in the event any insurer does not within sixty days furnish satisfactory evidence to the rating organization of the correction of any error or omission previously called to its attention by the rating organization, it shall be the duty of the rating organization to notify the director thereof. All information so submitted shall be confidential.

§ 20-365. *Cooperation in rate making*

Cooperation among rating organizations and among rating organizations and insurers in rate making and in other matters within the scope of this article is authorized, if the filings resulting from such cooperation are subject to the provisions of this article. The director may review such cooperative activities and practices if, after a hearing, he finds that any such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this article, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent, and requiring the discontinuance of such activity or practice.

§ 20-366. *Appeal by member or subscriber from action relating to filings*

A. Any member of or subscriber to a rating organization may appeal to the director from the action or decision of the rating organization in approving or rejecting any proposed change in or addition to the filings of the rating organization, and the director shall, after

a hearing held upon not less than ten days' written notice to the applicant and to the rating organization, issue an order approving the action or decision of the rating organization, or directing it to give further consideration to the proposal, or if the appeal is from the action or decision of the rating organization in rejecting a proposed addition to its filings, the director may, in the event that he shall find that such action or decision was unreasonable, issue an order directing the rating organization to make addition to its filings, on behalf of its members and subscribers, in a manner consistent with the finds of the director, within a reasonable time after the issuance of the order.

B. In the case of insurance to which this article applies, if the appeal is based upon the failure of the rating organization to make a filing on behalf of such member or subscriber which is based on a system of expense provisions which differs from the system of expense provisions included in a filing made by the rating organization, the director shall, if he grants the appeal, order the rating organization to make the requested filing for use by the applicant. In deciding the appeal the director shall apply the standards set forth in § 20-356.

C. In the case of title insurance, if the appeal is from the action or decision of the rating organization with regard to a rate or proposed change in or addition to its filings relating to the character and extent of coverage, the director may, in the event that he shall find that such action or decision was unreasonable, issue an order directing the rating organization to proceed in a manner consistent with his findings, within a reasonable time after the issuance of the order. The failure of a title insurance rating organization to take action or make a decision within thirty days after submission to it of a proposal under this article shall constitute a rejection of such proposal within the meaning of this section. If such appeal is based upon the failure of the rating organiza-

tion to make a filing on behalf of such members or subscriber which is based on a system of expense allocation which differs from the system of expense allocation included in a filing made by the rating organization, the director shall, if he grants the appeal, order the rating organization to make the requested filing for use by the applicant. If deciding such appeal, the director shall apply the standards set forth in § 20-375.

§20-367. *Rating information required to be furnished insured persons; hearing; appeal*

A. Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving a written request therefor and upon payment of such reasonable charge as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate.

B. Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means by which any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which the rating system has been applied in connection with the insurance afforded him. If the rating organization or insurer fails to grant or reject the request within thirty days after it has been made, the applicant may proceed in the same manner as if his application had been rejected.

C. Any party affected by the action of the rating organization or the insurer on a request made pursuant to this section may, within thirty days after written notice of such action appeal to the director, who, after a hearing held upon not less than ten days written notice to the applicant and to the rating organization or insurer, may affirm or reverse such action.

§ 20-368. *Advisory organizations*

A. Every group, association or other organization of insurers, whether located within or outside this state, which assists insurers which make their own filings or rating organizations in rate making, by the collection and furnishing of loss or expense statistics, or by the submission of recommendations, but which does not make filings under this article, shall be known as an advisory organization.

B. Every advisory organization shall file with the director:

1. A copy of its constitution, its articles of agreement or association or its certificate of incorporation and a copy of its bylaws, rules and regulations governing its activities.

2. A list of its members.

3. The name and address of a resident of this state upon whom notices or order of the director or process affecting the advisory organization may be served.

4. An agreement that the director may examine the advisory organization in accordance with the provisions of § 20-370.

C. If, after a hearing, the director finds that the furnishing of such information or assistance involves any act or practice which is unfair or unreasonable or otherwise inconsistent with the provisions of this article, he may issue a written order specifying in what respects such act or practice is unfair or unreasonable or otherwise inconsistent, and requiring the discontinuance of such act or practice.

D. No insurer which makes its own filings nor any rating organization shall support its filings by statistics or adopt rate making recommendations furnished to it by an advisory organization which has not complied with this

section or with an order of the director involving such statistics or recommendations issued under subsection C of this section. If the director finds the insurer or rating organization to be in violation of this subsection, he may issue an order requiring the discontinuance of the violation.

§ 20-369. *Joint underwriting or joint reinsurance*

A. Every group, association or other organization of insurers which engages in joint underwriting or joint reinsurance shall be subject to regulation with respect thereto as provided by this article, subject, however, with respect to joint underwriting, to all other provisions of this article, and with respect to joint reinsurance, to the provisions of §§ 20-370 and 20-374.

B. If, after a hearing the director finds that any activity or practice of any such group, association or other organization is unfair or unreasonable or otherwise inconsistent with the provisions of this article, he may issue a written order specifying in what respects the activity or practice is unfair or unreasonable or otherwise inconsistent and requiring the discontinuance of the activity or practice.

§ 20-370. *Examinations of rating organizations.*

A. The director shall, at least once in every five years, make or cause to be made an examination of each rating organization licensed in this state, and he may, as often as he deems it expedient, make or cause to be made an examination of each advisory organization referred to in § 20-368, and of each group, association or other organization referred to in § 20-369. The reasonable costs of such examination shall be paid by the rating organization, advisory organization or group, association or other organization examined upon presentation to it of a detailed account of the cost.

B. The officers, managers, agents and employees of the rating organization, advisory organization or group, association or other organzation may be examined at any time under oath, and shall exhibit all books, records, accounts, documents or agreements governing its methods of operation.

C. The director shall furnish two copies of the examination report to the organization, group or association examined and shall notify the organization, group or association that it may, within twenty days thereafter, request a hearing on the report or on any facts or recommendations therein. Before filing the report for public inspection, the director shall grant a hearing to the organization, group or association examined.

D. The report of the examination, when filed for public inspection, shall be admissible in evidence in any action or proceeding brought by the director against the organization, group or association examined, or its officers or agents, and shall be prima facie evidence of the facts stated therein.

E. The director may withhold the report of the examination from public inspection for such time as he deems proper.

F. In lieu of the examination, the director may accept the report of an examination made by the insurance supervisory official of another state, pursuant to the laws of such state.

§ 20-371. *Rate administration*

A. Recording and reporting of loss and expense experience. The director shall promulgate reasonable rules and statistical plans, reasonably adapted to each of the rating systems on file with him, which may be modified from time to time and which shall be used thereafter by each insurer in the recording and reporting of its loss and countrywide expense experience in order that the ex-

perience of all insurers may be made available, at least annually, in such form and detail as may be necessary, to aid the director in determining whether rating systems comply with the standards set forth in this article. The rules and plans may also provide for the recording and reporting of expense experience items which are especially applicable to this state and are not susceptible of determination by prorating of countrywide expense experience.

B. In promulgating the rules and plans, the director shall give due consideration to the rating systems on file with him, and, in order that the rules and plans may be as uniform as is practicable among the several states, to the rules and to the form of plans used for such rating systems in other states.

C. No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system filed by it.

D. The director may designate one or more rating organizations or other agencies to assist him in gathering such experience and making compilations thereof, and the compilations shall be made available subject to reasonable rules promulgated by the director, to insurers and rating organizations, but no insurer shall be required to file its experience with an organization of which it is not a member or subscriber.

E. Interchange of rating plan data. Reasonable rules and plans may be promulgated by the director for the interchange of data necessary for the application of rating plans.

F. Consultation with other states. In order to further uniform administration of rate regulatory laws, the director and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in

other states and may consult with them with respect to rating making and the application of rating systems.

§ 20-372. *Disclosure of information relating to rates*

No person or organization shall willfully withhold information from, or knowingly give false or misleading information to, the director, any statistical agency designated by the director, any rating organization or any insurer, which will affect the rates or premiums chargeable under this article.

§ 20-373. *Commissions and fees*

Nothing in this article shall abridge or restrict the freedom of contract of insurers, agents or brokers with reference to the amount of commissions or fees to be paid to agents or brokers by insurers, and such payments are expressly authorized.

§ 20-374. *Revocation and suspension of licenses*

The director may suspend the license of any rating organization or the certificate of authority of any insurer which fails to comply with an order of the director made pursuant to this article within the time limited by the order, or any extension thereof which may be granted by the director. The director shall not suspend the license of any rating organization or the certificate of authority of any insurer for failure to comply with an order until the time prescribed for a review thereof has expired, or if a review has been sought, until the order has been affirmed. The director may determine when a suspension of license or certificate shall become effective, and it shall remain in effect for the period fixed by him, unless he modifies or rescinds the suspension, or until the order upon which suspension is based is modified, rescinded or reversed. No license or certificate shall be suspended or revoked except upon the written order of the director stating his findings, made after a hearing held upon not

less than ten days written notice to such person or organization, specifying the alleged violation.

§ 20-375. *Making of title insurance and escrow rates*

A. Every title insurer that shall make its own rates, and every title insurance rating organization, shall make rates that are not excessive or inadequate for the safety and soundness of any title insurer, which do not unfairly discriminate between risks in this state which involve essentially the same exposure to loss and expense elements, and which shall give due consideration to the following matters:

1. The desirability for stability of rate structures;

2. The necessity, by encouraging growth in assets of title insurers in periods of high business activity, of assuring the financial solvency of title insurers in periods of economic depression; and

3. The necessity for paying dividends to the capital stock of title insurers sufficient to induce capital to be invested therein.

B. Every title insurer that shall make its own rates, and every title insurance rating organization shall adopt basic classifications of policies or contracts of title insurance or escrow services which shall be used as the basis for rates.

C. Rates within each rate classification may, at the discretion of the title insurer which files its own rates, or at the discretion of the title insurance rating organization, be less than the cost of the expense elements in the case of smaller insurances or escrows, and the excess may be charged against the large insurances or escrows without rendering the rates unfairly discriminatory.

D. There shall be no combined rate for the issuance of title insurance policies and escrow services rendered in connection with such insurance.

§ 20-376. *Filing of title insurance and escrow rates*

A. Every title insurer shall file with the director its schedules of fees, every manual of classifications, rules and plans pertaining thereto, and every modification of any of the foregoing which it proposes to use in this state. Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage or service contemplated.

B. A title insurer may satisfy its obligations to make such filings by becoming a member of, or a subscriber to, a licensed title insurance rating organization which makes such filings, and by authorizing the director accept such filings on its behalf.

C. Every title insurer shall make its filings directly or through a licensed title insurance rating organization which makes such filings, and all such filings may, at the option of such insurer, govern all of its or certain designated agents in this state, provided that any such insurer may elect to permit all or certain of its agents to make rate filings directly or to become a subscriber to a licensed title insurance rating organization which makes such filings.

D. The director shall make such review of the filings as may be necessary to carry out the provisions of this article.

E. Subject to the provisions of subsection H of this section, each filing shall be on file for a period of fifteen days before it becomes effective. The director may, upon written notice given within such period to the person making the filing, extend such waiting period for an additional period, not to exceed fifteen days, to enable him to complete the review of the filing. Further extensions of such waiting period may also be made with the consent of the person making the filing. Upon written application by the person making the filing, the director

may authorize a filing or any waiting period or any extention thereof.

F. Except in the case of rates filed under subsection H of this section, a filing which has become effective shall be deemed to meet the requirements of this article.

G. When the director finds that any rate for a particular kind or class of risk or escrow service, cannot practicably be filed before it is used or any contract or kind of title insurance or escrow service, by reason of rarity or peculiar circumstances, does not lend itself to advance determination and filing of rates, he may, under such rules and regulations as he may prescribe, permit such rate to be used without a previous filing and waiting period.

H. Beginning ninety days after the effective date of this section, no title insurer or title insurance agent shall charge any fee for any policy or contract of title insurance or escrow service except in accordance with filings or rates which are in effect for such title insurer or agent as provided in this section.

I. The director shall not have the power to regulate, or require the filing of, rates or fees for reinsurance policies, contracts or agreements of excess coinsurance.

§ 20-377. *Justification for title insurance and escrow rates*

A. A title insurance or escrow rate filing shall be accompanied by a statement of the title insurer, agent, or title insurance rating organization making the filing, setting forth the basis upon which the rate was fixed, and the manner in which fees are to be computed. Any filing may be justified by:

1. The experience or judgment of the title insurer, agent, or title insurance rating organization making the filing,

2. Its interpretation of any statistical data relied upon,

3. The experience of other title insurers, agents, or title insurance rating organizations, or

4. Any other factors which the title insurer, agent or title insurance rating organization deem relevant.

B. The statement and justification shall be open to public inspection after the rate to which it applies becomes effective.

§ 20-378. *Disapproval of title insurance and escrow filings*

A. Before issuing an order of disapproval of a title insurance or escrow rate filing, the director shall hold a hearing upon not less than ten days' notice, specifying in reasonable detail the matters to be considered at such hearing. Such notice shall be sent to every title insurer, agent, and title insurance rating organization which made such filing. If, after such hearing, the director shall find that such filing or a part thereof does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that it so fails, and stating when, within a reasonable period thereafter, such filing or a part thereof shall be deemed no longer effective if the filing or a part thereof has become effective under the provisions of § 20-376. A title insurer, agent, or title insurance rating organization shall have the right at any time to withdraw a filing or a part thereof, subject to the provisions of § 20-379 in the case of a deviation filing. Copies of every such order shall be sent to every title insurer, agent, and title insurance rating organization affected. Such an order shall not affect any contract or policy made or issued or escrow contracted prior to the expiration of the period set forth therein.

B. Any person or organization aggrieved with respect to any filing which is in effect may make written application to the director for a hearing thereon but the title insurer or title insurance rating organization which made the filing shall not be authorized to proceed under this subsection. Such an application shall specify in reasonable detail the grounds to be relied upon by the applicant. If the director shall find that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within thirty days after receipt of such application, hold a hearing upon not less than ten days' written notice to the applicant and to every title insurer, agent, and title insurance rating organization which made such a filing. If, after such hearing, the director finds that the filing or a part thereof does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing or a part thereof fails to meet the requirements of this article, stating when within a reasonable period thereafter such filing or a part thereof shall be deemed no longer effective. Copies of such an order shall be sent to the applicant and to every such title insurer, agent, and title insurance rating organization. Such an order shall not affect any contract or policy made or issued prior to the expiration of the period set forth therein.

C. No filing nor any modification thereof shall be disapproved if the rates in connection therewith meet the requirements of this article.

§ 20-379. *Deviations in title insurance and escrow rates*

Every member of or subscriber to a title insurance rating organization shall adhere to the filings made on its behalf by such organization, except that any title insurer or agent which is a member of or subscribed to such a rating organization may file with the director a

uniform percentage of decrease or increase to be applied to any or all elements of the fees produced by the rating system so filed for a class of title insurance or escrow service which is found by the director to be a proper rating unit for the application of such uniform decrease or increase, or to be applied to the rates for a particular area. Such deviation filing shall specify the basis for the modification and shall be accompanied by the data or historical pattern upon which the applicant relies. A copy of the deviation filing and data shall be sent simultaneously to the rating organization whose filing is affected. Any such deviation filing shall be on file for a waiting period of fifteen days before it becomes effective. Extension of such waiting period may be made in the same manner that such period is extended in the case of rate filings. The director may authorize a deviation filing or any part thereof to become effective before the expiration of the waiting period or any extension thereof. Deviation filings shall be subject to the provisions of § 20-378. Each deviation shall be effective for at least one year unless terminated sooner with the approval of the director, or in accordance with the provisions of § 20-378.

§ 20-1562. *Definitions*

In this article, unless the context otherwise requires:

1. "Applicants for insurance" shall be deemed to include all those, whether or not prospective insureds, who from time to time apply to a title insurer, or to its agent, for title insurance, and who at the time of such application are not agents for such title insurer.

2. "Business of title insurance" shall be deemed to be:

(a) The making as insurer, guarantor or surety, or proposing to make as insurer, guarantor or surety, of any contrast or policy of title insurance;

(b) The transacting or proposing to transact, any phase of title insurance, including solicitation, negotiation preliminary to execution, execution of a contract of title insurance, insuring and transacting matters subsequent to the execution of the contract and arising out of it, including reinsurance and the performance by a title insurer or title insurance agent of escrow services; or

(c) The doing, or proposing to do, any business in substance equivalent to any of the foregoing.

3. "Net retained liability" means the total liability retained by a title insurer under any policy or contract of insurance, or under a single insurance risk as defined in or computed in accordance with paragraph 5 hereof, after the purchase of reinsurance.

4. "Risk premium" for title insurance means that portion of the fee charged by a title insurer, or agent of a title insurer to an insured or to an applicant for insurance, for the assumption by the title insurer of the risk created by the issuance of the title insurance policy.

5. "Single insurance risk" means the insured amount of any policy or contract of title insurance issued by a title insurer unless two or more policies or contracts are simultaneously issued on different estates in identical real property, in which event, it means the sum of the insured amounts of all such policies or contracts, provided, however, that any such policy or contract that insures a mortgage interest or a vendor's interest that is expected in a fee or leasehold policy or contract, and which does not exceed the insured amount of such fee or leasehold policy or contract, shall be excluded in computing the amount of a single insurance risk.

6. "Title insurance" means insuring, guaranteeing or indemnifying owners of real property or others interest therein against loss or damages suffered by reason of liens, encumbrances upon, defects in or the unmarket-

ability of the title to such property, guaranteeing, warranting or otherwise insuring the correctness of searches relating to the title to real property, or doing any business in substance equivalent to any of the foregoing.

7. "Title insurance agent" means a domestic or foreign stock corporation authorized in writing by a title insurer to solicit insurance and collect premiums and to issue or countersign policies in its behalf, provided, however, that the term "title insurance agent" shall not include officers or salaried employees of any title insurer authorized to do a title insurance business with this state.

8. "Title insurance plant" means a set of records in which an entry has been made of all documents or matters which under the law impart constructive notice of matters affecting title to real property or any interest therein or encumbrance thereon, which have been filed or recorded in the county for which such title plant is maintained for a period of not less than the immediately preceding twenty years. In order to constitute a title insurance plant, as used here, such records shall include:

(a) An index or indices in which notations of or references to any such documents that describe the property affected thereby are posted, entered or otherwise included, according to the property described therein; or copies or briefs of all such documents that describe the property affected thereby which are sorted and filed according to the property described therein and

(b) An index or indices in which all other such documents are posted, entered or otherwise included, according to the name or names of the parties whose title to real property or any interest therein or encumbrance thereon is affected.

(c) The title insurance plant owned or jointly owned by a title insurer or the agent of a title insurer which

was the holder of a validly issued, unexpired and unrevoked certificate of authority immediately prior to the effective date hereof shall be deemed to constitute a title insurance plant hereunder for the period ending July 1 five years after the effective date hereof.

9. "Title insurer" means any domestic company organized under the provisions of this title for the purpose of insuring titles to real property, any title insurance company organized under the laws of another state and licensed to insure titles to real estate within this state pursuant to the provisions of this article, and any domestic or foreign company having the power and authorized to insure titles to real estate within this state as of the effective date hereof which meet the requirements of this article.

§ 20-1567. *Determination of insurability required*

A. No policy or contract of title insurance shall be written on any risk located in this state except by a title insurer authorized to do business in this state, nor unless and until the title insurer has caused to be conducted a reasonable examination of the title and has caused to be made a determination of insurability of title in accordance with sound underwriting practices for title insurers.

B. No title insurer shall write title insurance in, nor issue any title insurance policy with respect to risks located in, any county of this state with a population, as shown by the latest decennial census, in excess of one hundred thousand, unless the title insurer or its agent in that county maintains a title insurance plant covering title records of such county, or unless the insurer issues its policy based on a policy issued to it by another title insurance company, or its agent, who meets the requirements of this section provided, however, that for the purposes of this subsection a title insurer or title

insurance agent shall be deemed to maintain a title insurance plant if it is the sole lessee thereof or joint owner or has a sole or joint beneficial interest in such a plant. For the purpose of this subsection, each ownership must be equal to every other ownership in such plant.

C. This section shall not apply to a reinsurer or an excess coinsurer, provided the orginating insurer complies with subsections A and B of this section.

No. 83-154

In the Supreme Court of the United States

OCTOBER TERM, 1983

TITLE INSURANCE RATING BUREAU OF ARIZONA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

BARRY GROSSMAN
STEPHEN F. ROSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether private collective rate agreements among escrow agents are "state action" and therefore not subject to the Sherman Act, when the state neither compels joint ratemaking instead of independent individual pricing nor expresses a policy favoring joint ratemaking.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 700 F.2d 1247. The opinion of the district court (Pet. App. 12a-25a) is reported at 517 F. Supp. 1053.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1983. On June 29, 1983, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to August 1, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a title insurance rating bureau licensed by the State of Arizona. It has 13 title insurer members and additional non-voting insurance agent subscribers which are

engaged in the business of title insurance. Pet App. 2a. Petitioner performs various functions: (1) it establishes schedules of title insurance rates for its members and subscribers; (2) it establishes schedules of rates for escrow services performed by its members and subscribers; and (3) it conducts studies for the purpose of developing its various rate schedules, and files those schedules with the appropriate state regulatory bodies. Only the legality of the second function — the joint setting of escrow service fees — is at issue in this litigation.

Before 1977, Arizona law required title insurers to file only their title insurance rates with the state director of insurance. In 1977, state law was amended to require the filing of rates charged by title insurers for escrow services.[1] State law allows such a provider of escrow services to choose between filing an independent rate, on the one hand, and agreeing with competitors on uniform rates, on the other. Agreed-upon rates are filed on behalf of the agreeing insurers by a licensed titled insurance rating organization such as petitioner. State law further provides that any member or subscriber of a title insurance rating organization may file a deviation from the rates filed by such an organization. Also, a title insurer, agent, or title insurance rating organization may withdraw a filing or a part thereof at any time. Pet. App. 2a, 4a; Ariz. Rev. Stat. Ann. §§ 20-375, 20-376, 20-378. A, 20-379 (1975 & Supp. 1982-1983).

In October and November 1977, petitioner's board of directors held a series of meetings at which rates for escrow services performed by title insurers and their agents were discussed and classified. The board agreed on a schedule of escrow service rates and authorized its submission to the

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[1]Escrow agents not serving as title insurers or title insurance agents are not subject to these rate filing requirements.

director of the Arizona Department of Insurance. Subsequent amendments and revisions were also filed. Pet. App. 2a.

Under Arizona law, the rate filing automatically becomes effective after a 15-day waiting period, unless the Director of Insurance holds a hearing and disapproves it. The Director may extend the waiting period or authorize a filing to become effective before the expiration of the waiting period. Ariz. Rev. Stat. Ann. § 20-376.E (Supp. 1982-1983). The Director did not hold a hearing on, or disapprove, petitioner's proposed rates, and the parties stipulated in the district court that the Director has never disapproved an escrow rate. Stip. para. 60.[2] Moreover, the Director of Insurance did not conduct an examination of petitioner's accounts and records as required by state law (Stip. para. 59; Ariz. Rev. Stat. Ann. § 20-370 (1975)). Stip. para. 59, 60.

2. The government brought this action under Section 4 of the Sherman Act, 15 U.S.C. 4, to enjoin petitioner from engaging in continuing violations of Section 1 of the Sherman Act, 15 U.S.C. 1. The government did not seek damages. No state agencies or state officials were named as defendants by the government and the government did not seek to enjoin any state regulatory functions; indeed, the State of Arizona filed a complaint similar to that of the United States. Pet. App. 15a.

The government alleged that petitioner and its members and subscribers engaged in an illegal combination to fix and maintain fees for escrow services in the State of Arizona in restraint of interstate commerce. Petitioner conceded that its members discussed escrow services and rates and agreed on schedules of uniform prices for escrow services. Stip.

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[2] "Stip." refers to the parties' stipulation, which is docket entry 30 in the district court record.

para. 8. Petitioner asserted that this conduct did not violate the Sherman Act for several reasons. In this Court it has abandoned all its contentions except its claim that its conduct was immunized from antitrust liability by actions of the State of Arizona.

The United States District Court for the District of Arizona granted the government's motion for summary judgment. Pet. App. 12a-25a. The court rejected petitioner's claim of "state action" immunity on the ground that this Court's decisions established that privately imposed restraints of trade could not be deemed state action exempt from the federal antitrust laws unless they were compelled by the state. *Id.* at 20a, citing *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Here, the court found (Pet. App. 21a; citations omitted):

> The State of Arizona does not compel the title insurance companies to charge a uniform rate for escrow services. * * * In three separate provisions the legislature provides that a title insurer has the choice of filing its own escrow rates or having its rates filed by a rating organization. * * *
>
> * * * Further, the history of the escrow legislation reveals that the legislature explicitly decided not to give title insurers and agents immunity from the state antitrust laws. * * * Proponents of the legislation stressed the competitive features of the law in testimony before the legislature.

3. The court of appeals affirmed. Pet. App. 1a-11a. It reasoned (*id.* at 11a; footnote and citations omitted, emphasis added):

> [T]he state does not require uniform rates: it allows a title insurer to file independent rates separately, to file independent rates through a rating bureau, or to deviate from rates filed by a rating bureau on its behalf.

> The most that can be said for [petitioner's] position is that the statute *authorizes* cooperative action in ratemaking. This does not constitute a clearly articulated and affirmatively expressed state policy to restrict competition.

The court based these conclusions on the language of the governing statute itself, which provides (*ibid.*, quoting Ariz. Rev. Stat. Ann. § 20-341 (1975)):

> Nothing in this article is intended to prohibit or discourage reasonable competition, or to prohibit or encourage, except to the extent necessary to accomplish the purpose stated in this section, uniformity in insurance rates * * *.

The court of appeals explained that "[t]his reflects neutrality by the Arizona legislature to competition and uniform rates, not 'a clearly articulated and affirmatively expressed state policy.' " Pet. App. 11a; citation omitted.

ARGUMENT

Petitioner no longer disputes that the challenged collective rate agreements constitute price fixing that would ordinarily be per se unlawful under the Sherman Act. Petitioner's sole contention is that the agreements are exempt from the Sherman Act under the "state action" doctrine. This contention is foreclosed by the decisions of this Court and by the logic of the "state action" exemption, both of which deny "state action" immunity to private conduct unless it is compelled by the state. Moreover, even if this Court were to overrule its prior decisions and apply a less rigorous standard to competitive restraints imposed by private conduct, the court of appeals correctly concluded that the Arizona statutory scheme does not reflect a clear policy in favor of replacing prices competition with regulated concerted price fixing by the providers of escrow services. Thus, plenary review is unwarranted.

1. Petitioner asserts that the court of appeals rejected its contention because the court believed that the state action exemption cannot be invoked unless a party shows that its anticompetitive action was compelled by the state. See Pet. 11, 14. Relying on *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), petitioner contends that it need not show compulsion by the state. Specifically, petitioner asserts that it is entitled to "state action" immunity here because it showed that its price-fixing was in accordance with "a clearly articulated and affirmatively expressed state policy" (Pet. 12-13).

In our Brief in Opposition in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, petition for cert. pending, No. 82-1922 (filed May 27, 1983), we explained why this Court's decisions and the rationale of the state action exemption require a private party seeking to invoke that exemption to show that its anticompetitive actions were compelled by the state. 82-1922 Br. in Opp. 9-17.[3] We also explained why different standards apply when an agency of government — instead of a private party — is named as a defendant, or when a suit seeks to enjoin the operation of a state statute. In those circumstances "state action" immunity can be invoked by showing a clearly articulated state policy to displace competition in the activity at issue, the implementation of which is closely supervised by the state. *Id.* at 13-14 n.8. We further explained why *Midcal* is fully consistent with these principles. *Id.* at 15-16.[4]

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[3]We have sent a copy of this brief to counsel for petitioner.

[4]Petitioner also relies (Pet. 12 n.16) on *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978). In that case, a state agency was empowered to disapprove the opening of new retail automobile dealerships, but it would undertake an inquiry into whether to disapprove a

Both courts below found, and petitioner acknowledges (Pet. 2, 14), that title insurers in Arizona are not compelled to fix and file uniform rates. As we noted, the United States neither sued governmental defendants nor sought to enjoin the operation of a state program. It follows that, for the reasons we stated in our Brief in Opposition in *Southern Motor Carriers*, petitioner cannot claim state action immunity.

Petitioner asserts (Pet. 14-16) that the decision of the court of appeals conflicts with decisions in several other circuits that, according to petitioner, do not require a party

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proposed new entry only if a protest was lodged by a competing dealer. *Id.* at 98, 103.

The Court in *Orrin Fox* concluded that the *state agency's* anticompetitive actions were state action, and therefore exempt from the Sherman Act, because they were part of "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom" (439 U.S. at 109). As we have said, this standard is indeed applicable to the actions of units of government.

But the Court in *Orrin Fox* did not exempt the *private* conduct from the Sherman Act for this reason. The Court stated that the private conduct was immune not under the "state action" exemption but under the so-called *Noerr-Pennington* doctrine (439 U.S. at 110): "Protesting dealers who invoke in good faith their statutory right to governmental action in the form of a Board determination that there is good cause for not permitting a proposed dealership do not violate the Sherman Act, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *Mine Workers* v. *Pennington*, 381 U.S. 657, 670 (1965)." Indeed, the court in *Orrin Fox* squarely stated that the state had *not* "attempted to authorize and immunize private conduct violative of the antitrust laws" (*ibid.*); thus the Court made it clear that the state action exemption was not relevant to the assessment of the private conduct.

We note that no Justice dissented from the Court's discussion of the antitrust issue in *Orrin Fox* and that the opinion in no way intimated that it was inconsistent with the compulsion requirement made explicit in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976).

to show compulsion in order to invoke the state action exemption. Petitioners in *Southern Motor Carriers* made a similar claim about three of the decisions relied upon by petitioner here — *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), petition for cert. pending, No. 82-1832 (filed May 11, 1983); *Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*, 475 F. Supp. 711 (D.D.C. 1979), aff'd per curiam, No. 79-1658 (D.C. Cir. July 3, 1980), cert. denied, 450 U.S. 914 (1981); *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), cert. denied, 456 U.S. 1011 (1982). Our explanation of why those decisions do not conflict with the court of appeals' decision in *Southern Motor Carriers* applies equally to petitioner's contention here. See 82-1922 Br. in Opp. 17-18.[5] Petitioner also relies on *Gold Cross Ambulance & Transp.* v. *City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), petition for cert. pending, No. 83-138 (filed July 25, 1983). But as petitioner acknowledges (Pet. 16), that case, like *Town of Hallie* v. *City of Eau Claire, supra*, involved only a municipal defendant and therefore did not address the question whether state compulsion is required to establish a private party's state action immunity.[6]

2. Even if the Court does not accept the position we advance in *Southern Motor Carriers*, petitioner's claim does not merit further review. Petitioner, relying on *Midcal*,

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[5]We also note that *Turf Paradise* was an earlier decision by the Ninth Circuit and therefore presents, at most, a conflict within a circuit, which this Court does not ordinarily review. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[6]Petitioner may also assert a conflict with another Eighth Circuit decision, *First American Title Co.* v. *South Dakota Land Title Ass'n*, No. 82-1753 (Aug. 11, 1983). But as the court there carefully emphasized (slip op. 19), that decision, too, did not involve the application of the state action exemption to the anticompetitive acts of private parties; it was a challenge to state statutes and the actions of a state regulatory agency.

asserts that the correct test to apply to its conduct is whether its actions were pursuant to a "clearly articulated and affirmatively expressed state policy." Pet. 11; see *id.* at 16. But the court of appeals (Pet. App. 11a) and the district court (*id.* at 21a) both found that Arizona does not have such a policy in favor of uniform rate-setting, and their rulings were correct. Thus petitioner is not entitled to prevail even if this Court adopts the standard it embraces.[7]

a. As the courts below noted, the plain language of the Arizona statute shows that the state did not adopt a policy favoring the uniformity of rates. The district court noted that the statute makes it clear that title insurers may file individual rates, and the court of appeals quoted statutory language expressly eschewing an intent to discourage competition or to promote uniform rates. Pet. App. 11a, 21a; see pages 4-5, *supra*. Moreover, the Arizona statute expressly authorizes members and subscribers of rating bureaus to file deviations from their rating organization's rates precisely "so that competitive rates may inure to the benefit of the public." *Pacific Fire Rating Bureau* v. *Insurance Co. of North America*, 83 Ariz. 369, 375, 321 P.2d 1030, 1034 (1958).

Indeed, petitioner appears to concede that the state was "indifferen[t] as between joint and individual rate filings" (Pet. 14 n.19). As the Court has made clear, such legislative neutrality does not amount to the clear articulation of a state policy to displace competition that is required to exempt conduct from the Sherman Act. In *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40

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[7]Indeed, the court of appeals suggested that the Arizona statute merely authorized a rating bureau like petitioner to prepare and file rates separately determined by individual escrow providers. Pet. App. 11a n.2. Under this interpretation, the challenged price-fixing was not even *authorized* by state law, much less affirmatively expressed.

(1982), for example, the Court held that a municipality's moratorium on cable television expansion was not within the state action exemption even though it was authorized by the state constitution's grant of regulatory powers to municipalities, because the state was neutral on the question whether municipalities could restrain the expansion of cable television. The Court ruled (*id.* at 55): "[P]lainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive."

The Court further explained that it "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require" to hold that those criteria are satisfied when one municipality "can pursue its course of regulating cable television competition, while another * * * can choose to prescribe monopoly service, while still another can elect free-market competition" (*id.* at 56). Similarly, here, some title insurers and agents can strictly adhere to agreed-upon prices for escrow services, while others can adhere generally to the cartel price but deviate in certain circumstances, while still others can file independently competitive prices. All of these actions are equally contemplated and authorized by Arizona law. Accordingly, petitioner's contention that Arizona has a clear policy displacing competition in favor of collective ratemaking is incorrect.

b. The legislative history of the 1977 escrow regulatory statute further demonstrates that Arizona has not adopted a policy of displacing independent escrow rate competition with collective ratemaking. The Arizona legislature rejected a provision that would have given title insurers and their

agents a blanket exemption from state antitrust laws.[8] It also rejected a substitute provision, proposed by the Land Title Association of Arizona, which would have made the state antitrust laws inapplicable to any action by a title insurer (or agent) that was "approved by a statute of this state or the director [of insurance.]" [9] Moreover, the legislature understood that the legislation would permit price competition; the Land Title Association emphasized in the legislative hearings on the bill that the legislation would not set rates "for all title companies uniformly" and that companies could file separate rates.[10]

3. Another aspect of the Arizona regulatory scheme is that the statute specifies certain criteria that the Director of Insurance is to apply in reviewing filed rates. See Ariz. Rev. Stat. Ann. §§ 20-375.A, 20-376.D (Supp. 1982-1983). These criteria are generally designed to protect consumers from excessive rates and insurance companies from insolvency; for example, the rates are to give "due consideration to * * * [t]he necessity, by encouraging growth in assets of title insurers in periods of high business activity, of assuring the financial solvency of title insurers in periods of economic depression" (Ariz. Rev. Stat. Ann. § 20-375.A.2 (Supp. 1982-1983)). Petitioner repeatedly refers to these "non-market criteria" (Pet. 13) and contends that they support its

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[8] As originally proposed, the legislation would have given title insurers and their agents a blanket exemption from legal action under state law. H.B. 2316, Sec. 10, *reprinted in* Leg. Hist. 9. ("Leg. Hist." refers to the package of legislative history materials that we have lodged with the Court and sent to counsel for petitioner.) That provision was rejected by the House Commerce Committee. Leg. Hist. 11.

[9] See Leg. Hist. 16, 17 (amendment adopted by House Committee on Banking and Insurance); *id.* at 20 (amendment rejected by House Committee on Commerce); *id.* at 1 (amendment withdrawn when House considered proposed legislation).

[10] Leg. Hist. 15, 42.

claim to state action immunity. See, *e.g.*, *id.* at 10. It asserts that "the lower courts focused erroneously on the particular procedure by which Arizona requested rates to be filed rather than the substantive criteria that the state established for such rates". See also *id.* at 2-3, 6, 13-14 n.19.

This contention is plainly incorrect. The fact that the state has established these so-called "non-market criteria" suggests nothing about whether it has encouraged or required what amounts to price fixing among title insurers. The government did not seek to enjoin, and the district court did not enjoin, the operation of these criteria in any way. The state is free to enforce these criteria, and petitioner's members are free to file rates consistent with them. The question whether petitioner's members may *agree* upon the rates they file is, however, wholly distinct from the operation of these criteria.[11] As this Court's decisions establish, the fact that the government has established a regulatory regime to ensure that prices will fall within a certain " 'zone of reasonableness' " does not mean that it intends even to

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[11]This Court's decisions make it clear that the fact that a state has decided to substitute regulation for competition with respect to some aspect of an industry's activities does not, by itself, mean that the state has determined that competition has no role to play in the industry. For example, Virginia regulated the entry of lawyers into the profession, thereby departing from the free entry that characterizes unfettered competition, but in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), this Court found no evidence that the state had any policy favoring collective fee-setting. *Id.* at 789. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), Michigan had established a comprehensive system of regulating many of the activities of its electric utilities, but that fact alone did not evidence an intent to displace competition in the sale of light bulbs. *Id.* at 596. In every case, the question is not whether the state has substituted regulation for competition with respect to some aspects of the business involved, but whether the state has clearly articulated a policy of displacing the type of competition allegedly restrained by the challenged action.

permit — much less to encourage or require — anticompetitive activity, such as price-fixing, "within that zone." *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 460-461 (1945) (citation omitted). Here, petitioner concedes that the state did not require agreement on rates, and we have shown that the state did not even establish a policy affirmatively favoring such agreement. Petitioner is therefore not entitled to invoke the state action exemption.[12]

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[12]Petitioner suggests (Pet. 17) that this petition should be disposed of in light of *Hoover* v. *Ronwin*, cert. granted, No. 82-1474 (May 16, 1983). It seems unlikely, however, that this Court's decision in *Ronwin* will affect the questions presented in this case. *Ronwin* is an action against a state agency (the Arizona Supreme Court's Committee on Examinations and Admission), and, as we have noted, the standards that apply to state agencies are different from those that apply to private parties. Thus the issue whether compulsion is necessary to establish a state action defense for a private party is not presented in *Ronwin*. Moreover even if, as petitioner contends, the "clearly articulated state policy" test is applicable to private parties, the decision in *Ronwin* should have little bearing on the question whether that test was satisfied with respect to the conduct at issue in this case. In *Ronwin* the existence of a clearly articulated state policy to limit bar admission on the basis of competence is not disputed; the court of appeals concluded that the factual question whether the state agency's actions further that policy remains to be decided on remand. By contrast the issue here, even if state compulsion is not required, is whether the state has articulated a policy in favor of petitioner's conduct; the nature of that conduct is not in dispute. And as we have pointed out (pages 4-5, 8-11, *supra*), the courts below have clearly determined that petitioner's conduct is not supported by an articulated state policy.

We note that petitioners in *Southern Motor Carriers*, a case which, like the present case, involves private defendants, have not suggested that the Court's decision in *Ronwin* will control their case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

BARRY GROSSMAN
STEPHEN F. ROSS
Attorneys

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